

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anna A. Darbinian, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6)

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's July 8, 2015, decision denying his applications for (b) (6) pursuant to sections (b) (6) of the Immigration and Nationality Act, (b) (6), and his request for (b) (6), pursuant to (b) (6). The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). See also *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

The respondent's claim is (b) (6) in Guatemala. He testified that he had two uncles who worked for the national police in the 1990's through the early 2000's, (b) (6) the respondent's family (I.J. at 2; Tr. at 50). In 1992, (b) (6); the respondent and his family believe (b) (6) (I.J. at 2; Tr. at 50-51, 55). In 1999, his family moved to Salamar, (b) (6), (b) (6) (I.J. at 3; Tr. at 57-59).

In 2001, the respondent's cousin and one of his friends tried to (b) (6) (I.J. at 2; Tr. at 62). The respondent (b) (6), and his cousin (b) (6) (I.J. at 2; Tr. at 62). At the end of 2001, the respondent moved to Guatemala City to (b) (6) (I.J. at 2; Tr. at 63-64). In (b) (6) 2002, the respondent was (b) (6) (I.J. at 2; Tr. at 67). The respondent testified that (b) (6) the respondent was, and (b) (6) (I.J. at 2; Tr. at 67). The respondent was (b) (6)

approximately 15 days, (b) (6) (I.J. at 2-3; Tr. at 67-69). The respondent testified that he was (b) (6), and that one (b) (6) (I.J. at 3; Tr. at 69). The respondent did (b) (6), but testified that he (b) (6) (I.J. at 3; Tr. at 76). The respondent alleges that (b) (6) to his family members (b) (6).

We agree with the Immigration Judge's determination that the respondent is ineligible for (b) (6) based upon a failure to file (b) (6) as the respondent was unable to (b) (6) in Guatemala affecting his eligibility or (b) (6) in filing an application (I.J. at 6-9); section (b) (6) of the Act, (b) (6). We find no clear error in the Immigration Judge's findings of facts related to the issue of whether the respondent has sufficiently established that he (b) (6) so as to establish "(b) (6)" sufficient to (b) (6) application. The burden of proof is on the respondent to show that "any disability was directly related to the failure to file within the statutory period." See *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002). The respondent in this case did not do so. Accepting the respondent's entry date of 2004, based on his testimony and (b) (6) application, which was found credible by the Immigration Judge, he did not (b) (6) application until November 2012, almost 8 years after his last date of entry. While the respondent claims that he was (b) (6) when he entered the United States to timely file his application, the only evidence that he (b) (6) since arriving in the United States, were two medical documents indicating a hospital admission in 2013 when he (b) (6), and a 2014 admission when he was (b) (6) (I.J. at 7).

Further, while the respondent submitted a 2014 psychological evaluation from a clinical psychologist, who concluded that the respondent (b) (6) which impaired his ability to (b) (6) application, we agree with the Immigration Judge's determination to afford this evaluation little weight (I.J. at 7; Exh. 5, at 20). As indicated by the Immigration Judge, the respondent did not see a psychologist until ten years after his arrival in the United States (I.J. at 7). In addition, the psychologist met with the respondent on only one occasion for four hours, just weeks before his February 24, 2014, hearing date, and the evaluation was rendered only for the apparent purpose of addressing the timeliness of the respondent's (b) (6) application, with no follow up by the evaluating psychologist or other medical care professional (I.J. at 8). As also observed by the Immigration Judge, the respondent's claimed mental condition has not prevented him from his ability to work and to attend school (I.J. at 8). There is no indication in the record to show that the respondent was debilitated from his PTSD or that he was unable to function. Based on this record, we do not find clear error in the Immigration Judge's determination that the respondent did not submit sufficient evidence to establish that his recent diagnosis for (b) (6) application within the (b) (6) after his arrival in 2004. See 8 C.F.R. § 1208.4(a)(5)(i).

The Immigration Judge also pointed out that this proposed scenario, that the respondent was so (b) (6) in Guatemala that he could not (b) (6), is

(b) (6)

contradicted by his other claim of (b) (6), i.e., that he became too "discouraged" to pursue his application after contacting three notaries and two attorneys, and being told his case was complicated and would be expensive to pursue (I.J. at 7). As noted by the Immigration Judge, if the respondent was (b) (6) to file an application upon his arrival, that (b) (6) would also have prevented him from contacting any attorneys or notaries when he arrived in the United States (I.J. at 8).

The record also supports the Immigration Judge's determination that the respondent failed to meet his burden in establishing (b) (6) so as to allow him to file his (b) (6) application (b) (6) (I.J. at 9). The respondent claims that (b) (6) 2012, the (b) (6) 2012, (b) (6) a week later, were (b) (6) that he filed for (b) (6) after these events (Respondent's Br. at 24). However, we agree with the Immigration Judge that these events in Guatemala alleged by the respondent are merely a continuation of the underlying basis of what he claims led to his departure from Guatemala in 2004, (b) (6) (I.J. at 9).

The respondent remains eligible for (b) (6) under the Act. We find no clear error in the Immigration Judge's denial of (b) (6) based on her findings that the respondent did not establish a sufficient (b) (6) in Guatemala," or (b) (6) (Respondent's Br. at 26-34). We acknowledge that (b) (6). See (b) (6) (9th Cir. 2015) ("(b) (6)"); (b) (6) (BIA 2014) (citing with approval prior decisions finding the (b) (6)). However, the respondent has not established that (b) (6) in Guatemala, was or would be a (b) (6) in Guatemala. Specifically, as there is a lack of objective evidence connecting (b) (6) to each other and (b) (6) by the respondent, there is inadequate support here to conclude that the respondent faces a (b) (6).¹

That is, even if (b) (6) in Guatemala were (b) (6), the record lacks evidence to show that it was the (b) (6) the respondent or his family (b) (6). As observed by the Immigration Judge, (b) (6) by (b) (6) because she was (b) (6), with no allegation by the respondent that the (b) (6) (I.J. at 10; Tr. at 134). The only testimony offered by the respondent to substantiate that he was (b) (6) because of (b) (6)

¹ Lack of nexus also serves as an alternative basis to deny the respondent's (b) (6) claim.

(b) (6)

(b) (6), in which a (b) (6) for his (b) (6) because of (b) (6). As also observed by the Immigration Judge, the testimony offered about (b) (6) for his (b) (6) than (b) (6) (I.J. at 12; Tr. at 67). As pointed out by the Immigration Judge, if the respondent was (b) (6) would have been insufficient and the respondent would not have been (b) (6) (I.J. at 12). Additionally, according to the respondent's own testimony, after he was thr (b) (6) (b) (6), undermining his claim that he was (b) (6) because of (b) (6) (Tr. at 67).

We agree with the Immigration Judge that the respondent has not put forth evidence demonstrating that (b) (6) or because of (b) (6) (I.J. at 11). Rather, the respondent has introduced evidence demonstrating that (b) (6) to the (b) (6) throughout Guatemala, and, as pointed out by the Immigration Judge, some of that evidence raises an inference that some of (b) (6) themselves (I.J. at 11). See (b) (6) (9th Cir. 2010) (stating, "[a]n alien's desire to be (b) (6) motivated by (b) (6)"); (b) (6) (noting that (b) (6) is not available to (b) (6) under the Act). For example, one news article submitted by the respondent mentions (b) (6) in conjunction with (b) (6) (I.J. at 11; Exh. 4, at 35). The Immigration Judge further observed that the respondent's testimony about the (b) (6) in 2012, in which the cousin (b) (6), raised an inference that it was the result of (b) (6), with no indication (b) (6) (I.J. at 11; Tr. at 124-25, 133). While the respondent testified (b) (6) which were (b) (6), as observed by the Immigration Judge the respondent's testimony with regard to the alleged notes was inconsistent, and while he was able to (b) (6), he failed to produce copies of (b) (6) that would substantiate his claim of (b) (6) (I.J. at 5-6; 11; Tr. at 131-33). In addition, the fact that the respondent's nuclear family, consisting of numerous siblings, have (b) (6) from any consistent source undermines a conclusion that the (b) (6) by the respondent or his extended family members. See (b) (6) (BIA 2007).

Accordingly, we find that the respondent did not establish that (b) (6) in Guatemala, would be (b) (6) in Guatemala. The record also supports the Immigration Judge's determination that persons (b) (6) does not constitute a valid (b) (6) (I.J. at 12). Contrary to the respondent's argument on appeal, the respondent's (b) (6)

(b) (6)

(Respondent's Br. at 33-34). The (b) (6). See (b) (6) (BIA 2014). As described, (b) (6) could include persons of any age, sex, or background. See, e.g., (b) (6) (BIA 2007) (holding that (b) (6) Guatemalans lacks the (b) (6)). In addition, the respondent has not shown that (b) (6) meets the requirement of (b) (6), as there is nothing in the record that shows that (b) (6). *Id.* at 216-17; see e.g., (b) (6) (9th Cir. 2008) (finding that (b) (6)).

The record also supports the Immigration Judge's determination that the respondent did not demonstrate that the Guatemalan (b) (6) (I.J. at 13). As observed by the Immigration Judge, the respondent submitted news articles about the (b) (6) the (b) (6), and the respondent testified that (b) (6) family members (I.J. at 13). Based on the foregoing we find that the respondent did not establish eligibility for (b) (6) under section (b) (6) of the Act.

Finally, we conclude that the Immigration Judge did not clearly err in finding that the respondent has not demonstrated that (b) (6) (b) (6), as required for (b) (6) (I.J. at 15-17). See (b) (6) (9th Cir. 2012) (ruling that the Board reviews under the "clearly erroneous" standard the Immigration Judge's determinations regarding likelihood of future events, for purposes of eligibility for relief (b) (6)); (b) (6) (9th Cir. 2014). Evidence that (b) (6) in Guatemala is insufficient to demonstrate that the (b) (6) the respondent. The respondent has not presented any persuasive arguments on appeal that would cause us to reverse the Immigration Judge's denial of his application for (b) (6) (Respondent's Br. at 42-45). We therefore affirm the Immigration Judge's decision denying the respondent's application for (b) (6).

The following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Bedford, OH

Date:

DEC 11 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Margaret W. Wong, Esquire

APPLICATION: Reopening; termination

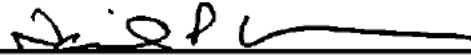
The final order of removal in these proceedings was entered by the Board on November 18, 2014, when we dismissed the respondent's appeal. The respondent filed an untimely motion to reopen his proceedings on October 8, 2015. See sections 240(c)(7)(A), (C) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C); 8 C.F.R. § 1003.2(c)(2). The respondent does not dispute the untimeliness of his motion, but requests that the Board exercise its sua sponte authority to reopen and terminate his proceedings in the interests of justice. See 8 C.F.R. § 1003.2(a). The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be granted.

The respondent asserts that on (b) (6), 2015, the Northern District Court of Indiana, South Bend Division, granted the respondent's petition filed pursuant to 28 U.S.C. § 2555 and the government's motion to dismiss the indictment against the respondent without prejudice in accordance with the United States Court of Appeals for the Seventh Circuit's decision in (b) (6) (7th Cir. 2015). This conviction formed the basis for the respondent's charges of removability under sections 237(a)(2)(A)(iii), (B)(i) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i). The respondent urges that the plea and resulting conviction were vacated by the circuit and state courts because he had not been apprised of the possible immigration consequences resulting from his guilty plea pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). He further argues that the DHS can no longer meet its burden of proof regarding the charges of removability based on the vacatur of his plea and conviction.

Considering the totality of circumstances presented in the respondent's motion, the proceedings are reopened and terminated on our own motion under the provisions of 8 C.F.R. § 1003.2(a). See *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). We find that the uncontested evidence presented shows that the underlying conviction which served as the basis for the respondent being subject to removal has been vacated due to a defect in the criminal proceeding. If a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(conviction vacated pursuant to Ohio law for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes). Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The removal proceedings are terminated and the record is returned to the Immigration Court without further action.

A handwritten signature in black ink, appearing to be "N. S. P.", is written over a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date:

MAR 16 2016

In re: (b) (6)

IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Ronald Neal Haber, Esquire

APPLICATION: Reopening

On August 4, 1998, the Board dismissed the applicant's appeal of the Immigration Judge's decision which ordered him excluded and deported to Haiti, and which found him ineligible for suspension of deportation under section 244(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1254(a). On March 30, 2010, the Board affirmed the Immigration Judge's denial of the applicant's request for adjustment of status under section 902 of the Haitian Refugee Immigrant Fairness Act of 1998, Pub. L. No. 105-277 ("HRIFA"). On November 25, 2015, the applicant filed a motion to reopen his exclusion proceedings in order to apply for (b) (6) under the Act and for (b) (6) pursuant to (b) (6). We will deny the applicant's motion to reopen.

The applicant's motion to reopen is untimely, as it was filed on November 25, 2015, more than 90 days after the final order of exclusion was entered against him on August 4, 1998. 8 C.F.R. § 1003.2(c)(2); see *Matter of J-J-*, 21 I&N Dec. 976, 978 (BIA 1997). An exception exists for motions to apply for (b) (6) arising in the country of nationality, if evidence is presented that is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 1003.2(c)(3)(ii); see *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007); *Matter of J-J-*, *supra*. A motion to reopen must state the new facts that will be proven at the reopened hearing and be supported by affidavits or other evidentiary materials demonstrating prima facie eligibility for the relief sought. See 8 C.F.R. § 1003.2(c)(1); see also *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); *Najjar v. Ashcroft*, 257 F.3d 1262, 1302-04 (11th Cir. 2001).

With his motion, the applicant submitted an October 20, 2014, psychological evaluation reflecting a diagnosis, "Rule out, 309.81, Posttraumatic stress and 293.9, Mental Disorder Not Otherwise Specified Due to Multiple Head Injuries" (Letter from (b) (6) ("(b) Letter") (Oct. 20, 2014)); North Miami police reports of crimes against the applicant in 2008 and 2011; letters of support; a copy of the 2014 *Country Reports on Human Rights Practices for Haiti* ("2014 Country Report"); a Haiti Travel Alert from the U.S. Department of State that expired on January 4, 2016; and an Application for (b) (6). The applicant in his motion contends that he suffers from Posttraumatic Stress and a Mental Disorder Not Otherwise Specified, and that "due to his

compromised mental health,” he cannot (b) (6) that exist in post-earthquake Haiti and would be (b) (6).

For the purpose of clarification, we note at the outset that the psychological evaluation the applicant submitted did not include a definitive diagnosis of Posttraumatic Stress Disorder. Rather, the psychologist in her letter opined that while she “suspects [that the applicant] may be suffering symptoms of Posttraumatic Stress[,]” she was “unable to obtain enough information . . . for [the applicant] to meet the DSM-IV diagnostic criteria for Posttraumatic Stress” ((b) (6) Letter, p. 4). Likewise, there is insufficient evidence provided to support the applicant’s claim in his motion that he is of “limited mental capacity and . . . incapable of caring for himself.” The letter from his pastor did not provide any information, foundation, or basis for his “opinion that [the applicant] is mentally incompetent and incapable of providing for himself” (Letter from Pastor (b) (6) (b) (6), 2015)). The psychological evaluation did not otherwise corroborate the applicant’s and the pastor’s claims in this regard. The psychologist indicated that while “there is a suspicion that [the applicant] may have cognitive deficits due to his head injuries,” it was impossible to definitively make this determination without a comprehensive neurological and neuropsychological evaluation of the applicant ((b) (6) Letter, p. 4). The psychologist found that the applicant appeared to struggle during questioning, as he was fixated on his personal traumas and fear of revictimization, but otherwise noted that the applicant has “been able to continue to perform the work skills he had before his head injuries . . . and he has learned to function in English” (*id.*).

The applicant’s motion to reopen will be denied. The applicant has not demonstrated his prima facie eligibility for (b) (6) under the Act, as the evidence he submitted did not establish that he (b) (6). A general and undifferentiated statement in the 2014 Country Report regarding the (b) (6), is insufficient to establish the applicant’s prima facie eligibility. The applicant’s claim of (b) (6) is premised upon a threshold claim that he is of limited mental capacity that rendered him incapable of caring for himself, which, as we noted above, is unsupported by objective evidence. The applicant, likewise, has not explained nor established with sufficient evidence how his particular diagnosis would trigger a series of events that would lead to his homelessness, which he claims would thereafter (b) (6), and thereafter to (b) (6). See (b) (6) (1987) (finding that (b) (6) under the Act “has no subjective component, but instead requires the alien to establish by objective evidence that it is (b) (6) upon deportation”).

¹ The applicant in his motion asserts that “[p]erhaps due to serious head trauma, [he] suffers from . . . mental health issues which arose after he was ordered excluded on May 28, 1997.” Consistent with this statement, the applicant has made no claim of mental incompetency at his prior hearings.

Similarly, the applicant did not establish a prima case for (b) (6), as he has not explained nor provided evidence that would demonstrate that he would (b) (6)

(b) (6) upon his return to Haiti. See (b) (6) (A.G. 2006) (to be eligible for (b) (6), the applicant must establish that each step in the hypothetical chain of events is more likely than not to happen); see also (b) (6) (11th Cir. 2007) (finding that evidence of (b) (6) and some isolated (b) (6) was insufficient to show that the applicant, individually, (b) (6) in the country of removal).

While we sympathize with the applicant's circumstances, we cannot conclude that he has met his heavy burden of proving that his motion to reopen his exclusion proceedings should be granted. The applicant has not alleged new facts that are supported by affidavits or other evidence demonstrating his prima facie eligibility for (b) (6) under the Act or for (b) (6). The following order will be entered.

ORDER: The applicant's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date:

FEB 26 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Monica N. Ganjoo, Esquire

ON BEHALF OF DHS: Bridget L. Park
Assistant Chief Counsel


APPLICATION: Reopening

ORDER:

The respondent has filed a motion to reopen seeking an opportunity to apply for adjustment of status based on an approved immediate relative spousal visa petition, in conjunction with a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). He also advises that a Utah state court recently issued an order modifying the amount of marijuana involved in his misdemeanor conviction for possession of marijuana, and asserts that as a result he is now eligible for the relief sought. The Department of Homeland Security (DHS) opposes reopening.

Based on the evidence provided and the totality of the circumstances presented, the respondent's proceedings are reopened pursuant to 8 C.F.R. § 1003.2(a), and the record is remanded for further proceedings, including additional fact finding and analysis by the Immigration Judge. On remand, the respondent may apply for any relief for which he qualifies.¹ He retains the burden of demonstrating his eligibility for any relief sought as a matter of law and discretion. See 8 C.F.R. § 1240.8(d). In remanding, we express no opinion as to the ultimate disposition of this case.

FURTHER ORDER: The record is remanded for further proceedings not inconsistent with the foregoing opinion, and for entry of a new decision.



FOR THE BOARD

¹ In its current filing, the DHS does not dispute the respondent's current statutory eligibility for adjustment of status, but argues only that such relief is not merited in discretion. The DHS may present its arguments in this regard on remand.

Falls Church, Virginia 22041

File: (b) (6) – Newark, NJ

Date: SEP - 1 2015

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: David L. Le Roy, Esquire

ON BEHALF OF DHS: George Douveas
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on November 5, 1999, when we upheld an Immigration Judge's decision denying the respondent's motion to reopen his deportation proceedings, which became administratively final on November 16, 1998. The respondent has now filed another motion to reopen these proceedings before the Board.¹ The motion was accompanied by a request for a stay of deportation, which the Board denied in an order on August 7, 2015. The motion to reopen, which remains pending, will be denied.

The instant motion is untimely filed by over a decade. *See* 8 C.F.R. § 1003.2(c)(2). It is also numerically barred because it is the respondent's second motion to reopen. *See id.*

The respondent, however, seeks reopening under the (b) (6) exception to the general time and number limitations on motions to reopen. *See* 8 C.F.R. § 1003.2(c)(3)(ii) (providing that the time and number limitations do not apply to an alien seeking reopening to apply or reapply for (b) (6) based on evidence of (b) (6) in the country of nationality, if such evidence is material and could not have been discovered or presented previously). Specifically, the respondent is seeking reopening to pursue (b) (6) based on (b) (6) in his native country of Haiti since his last hearing.

The respondent contends that he now faces (b) (6) in Haiti because he will (b) (6) that are (b) (6). The respondent asserts that Haitian (b) (6) have recently become even (b) (6) due to a 2010 (b) (6) that has (b) (6). The respondent also avers he is eligible for (b) (6) in Haiti, as well as (b) (6) the country in 2010.

¹ Before filing the instant motion, the respondent had filed a motion to reopen before the Immigration Court. However, an Immigration Judge denied that order without prejudice for lack of jurisdiction on July 9, 2015, after concluding that jurisdiction with this case was still vested with the Board.

To obtain reopening based on (b) (6), an alien must establish a prima facie case for the relief sought. *Shardar v. Att'y Gen.*, 503 F.3d 308, 312 (3d Cir. 2007) (noting that the prima facie case standard for a motion to reopen requires the applicant to produce objective evidence showing a reasonable likelihood that he can establish entitlement to relief). The respondent has not shown a reasonable likelihood that he is eligible for (b) (6), such that reopening of his proceedings due to (b) (6) would be warranted.

While (b) (6), the evidence proffered with the motion is insufficient to make a prima facie showing that Haitian (b) (6)

(b) (6) to others who would do so. See (b) (6) (3d Cir. 2008) ("there is no evidence that Haitian (b) (6)

(b) (6). Rather, the (b) (6) in the Haitian (b) (6) are due to Haiti's (b) (6)." (internal citation and quotations omitted)); (b) (6) (3d Cir. 2007) (providing that an alien seeking relief under (b) (6) can establish that (b) (6)

(b) (6); (b) (6) (3d Cir. 2005) (fact that Haitian national, if removed to Haiti, would be (b) (6)

(b) (6)). And while the respondent's (b) (6) Haiti is understandable in his circumstances, (b) (6) there, alone, are insufficient to demonstrate that (b) (6).

Based on the foregoing, the respondent has not demonstrated that reopening of these proceedings is warranted. We also do not find exceptional circumstances that would warrant reopening of these proceedings pursuant to our discretionary *sua sponte* authority under 8 C.F.R. § 1003.2(a).² Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.



FOR THE BOARD

² Any request for the favorable exercise of prosecutorial discretion or for general humanitarian relief from removal would have to be raised directly with the Department of Homeland Security.

Falls Church, Virginia 22041

File: (b) (6) - New York, NY

Date:

NOV 12 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

On October 21, 2002, the Board dismissed the respondent's appeal from Immigration Judge's December 13, 1999, decision denying his applications for (b) (6). This case was last before the Board on January 9, 2003, when we denied the respondent's motion to reopen. On September 3, 2015, the respondent filed the instant motion to reopen to reapply for (b) (6). The motion is untimely and number-barred and will be denied. See sections 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i).

The filing restrictions imposed on motions to reopen do not apply to motions to reopen to reapply for (b) (6) based on circumstances or conditions arising in the alien's country of nationality or the country to which the alien's removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The alien, however, bears the "heavy burden" to show that the proffered evidence is material, reflects (b) (6) in the country of nationality, and supports a prima facie case for a grant of (b) (6). See (b) (6) (BIA 2007), *aff'd* (b) (6) (2d Cir. 2008). The respondent has not demonstrated that the exception applies to this motion.

The respondent, who is of (b) (6) background, claims to (b) (6) in his native country, Pakistan (b) (6). The evidence offered with the motion includes media articles pertaining to (b) (6) in Pakistan since 2010; an affidavit from (b) (6) in Pakistan, and that (b) (6) arrival at the airport in Pakistan; and an excerpt from the 2014, U.S. Department of State Country Report for Pakistan.

The new evidence does not reflect a (b) (6) in Pakistan to warrant reopening under section 240(c)(7)(C)(ii) of the Act. See (b) (6) ("In determining whether evidence accompanying a motion to reopen demonstrates a material (b) (6) that would justify reopening, we compare the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below"); 8 C.F.R. § 1003.2(c)(3)(ii). As we have previously acknowledged in these proceedings, some Pakistani (b) (6) in response to the

(b) (6)

(b) (6) See Exhibit 44 at 6-8. The new evidence reflects the continuation of (b) (6) to the present.¹

In sum, reopening to enable the respondent to reapply for (b) (6) based on (b) (6) is not warranted. Further, it has not been shown that any (b) (6) applies to this motion, or that an exceptional situation is present in this case to warrant reopening pursuant to our limited sua sponte authority. See (b) (6) (BIA 1997); 8 C.F.R. §§ 1003.2(a), (c)(3). Accordingly, the respondent's untimely, number-barred motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

¹ The Immigration Judge noted that the respondent's parents immigrated to Pakistan from India in 1947. See Immigration Judge's Decision at 5. With the motion, the respondent has an articles reflecting the history of the (b) (6) in Pakistan along ethnic lines as told from (b) (6) (i.e., immigrants from India to Pakistan, and their descendants). Upon comparison of this article to the evidence of record, we find that the respondent has not shown a (b) (6) of Pakistan since the Immigration Judge's decision to warrant reopening pursuant to the (b) (6) to the filing restrictions.

Falls Church, Virginia 22041

File: (b) (6) - New York, NY

Date: MAR - 7 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Richard Wenfeng Chen, Esquire

ON BEHALF OF DHS: Mele Moreno
Assistant Chief Counsel

APPLICATION: Reopening

On July 22, 2015, the Board dismissed the respondent's appeal from the Immigration Judge's March 23, 2015, decision denying his applications for adjustment of status and concurrent waivers of inadmissibility. On January 8, 2016, the United States Court of Appeals for the Second Circuit granted the respondent's motion to withdraw his petition for review of the Board's decision, and terminated the judicial proceedings. *See Mughal v. Lynch*, No. 15-2673 (2d Cir. 2016). On January 11, 2016, the respondent filed the instant untimely motion to reopen with the Board. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). *See also Chen v. Gonzales*, 492 F.3d 153 (2d Cir. 2007) (holding that the time limit imposed on motions to reopen in immigration proceedings was not equitably tolled while the alien's petition for judicial review remained pending). The Department of Homeland Security opposes this motion. The motion will be denied.

The respondent seeks reopening to apply for (b) (6)

(b) (6) in his native country, Pakistan. The respondent (b) (6) in Pakistan because of his (b) (6), and because he is seen to be a United States citizen.¹ He claims that in 2006, (b) (6) in "North-West" Pakistan. *See* Motion to Reopen at 3. In 2010, the respondent and his brother (b) (6) friends, but were (b) (6). *Id.* In (b) (6) 2015, the respondent's brother (b) (6). The respondent asserts that his brother (b) (6) while he was making arrangements for the respondent's return to Pakistan. *Id.*

The respondent now (b) (6) in Pakistan, and asserts that (b) (6). *Id.* at 4. He further claims that the (b) (6) *Id.* at 3. In support of his claim, the respondent has offered

¹ The respondent's United States citizenship was revoked on August 4, 2013.

his own statement and affidavits from relatives, a neighbor, and a friend in Pakistan; documentation in support of (b) (6); documentation relating to his brother's (b) (6); and media articles and reports pertaining to conditions in Pakistan.

The 90-day filing deadline imposed on motions to reopen before the Board does not apply to motions to reopen to reapply for (b) (6) based on (b) (6) in the alien's country of nationality or the country to which the alien's removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing. See section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The alien bears the "heavy burden" to show that the proffered evidence is material, reflects (b) (6) arising in the country of nationality, and supports a prima facie case for a grant of (b) (6). (b) (6) (BIA 2007), *aff'd* (b) (6) (2d Cir. 2008). The respondent has not met this burden.

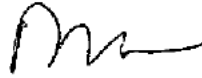
The record before the Immigration Judge in 2014 and 2015 did not include country conditions evidence. At that hearing, the respondent did not mention (b) (6) Pakistan, despite his current claims that he was (b) (6) when he visited in 2010 and (b) (6). The respondent designated Pakistan as the country of removal and did not indicate that he wished to apply for (b) (6). Tr. at 37, 83-85. Except for the evidence regarding the respondent's brother's (b) (6), the evidence offered with this motion largely pertains to conditions (b) (6) in Pakistan prior to the respondent's removal hearing.

Considering the proffered evidence of current conditions in Pakistan (Motion Exhibits B-E, I, O), we find that the motion does not reflect a (b) (6) to excuse the untimeliness of the respondent's motion. *Id.*, at 253 ("[i]n determining whether evidence accompanying a motion to reopen demonstrates a (b) (6) that would justify reopening, we compare the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below"); section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The respondent's brother's (b) (6) is certainly unfortunate. However, we are not persuaded that (b) (6), even taking into consideration the evidence presented claiming that it was somehow tied to the brother's efforts to prepare for the respondent's return to Pakistan, is sufficient to show (b) (6). This is so particularly in view of the fact that the respondent made no effort to seek (b) (6) at his hearing, even though he now says was (b) (6) when he was there in 2010. Further, the country conditions evidence presented shows that ongoing (b) (6) and continuing (b) (6) for United States citizens in Pakistan predate these removal proceedings. See Motion Exhibits I-O.

Finally, it has not been shown that any other exception to the filing deadline applies to this motion or that an (b) (6) is present in this case to warrant reopening pursuant to the Board's limited sua sponte discretion. See *Matter of J-J-*, 21 I&NDec. 976, 984 (BIA 1997); 8 C.F.R. §§ 1003.2(a), (c)(3).

Accordingly, the respondent's untimely motion to reopen will be denied and the following order will be entered. The respondent's request for a stay of removal is also denied.

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, appearing to be 'M' followed by a flourish.

FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) – Boston, MA

Date:

SEP - 2 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jeffrey B. Rubin, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Reconsideration

This case was last before the Board on April 10, 2015, when we dismissed the respondent's appeal of the Immigration Judge's March 2, 2012, decision for a second time. The respondent has now filed a motion to reconsider. The motion will be denied.

This case was originally before the Board on October 31, 2013, when we dismissed the respondent's appeal of the Immigration Judge's March 2, 2012, decision denying his motion to reconsider. On May 30, 2014, the United States Court of Appeals for the First Circuit, where this case arises, remanded the case to the Board for further consideration of our decision finding the respondent's conviction for the offense of assault and battery with a deadly or dangerous weapon in violation of Massachusetts General Laws chapter 265 section 15A to be a crime involving moral turpitude rendering him ineligible for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). On April 10, 2015, we issued our decision again dismissing the respondent's appeal. Specifically, we issued a lengthy decision finding the respondent's conviction to be a crime involving moral turpitude based on our long-standing precedent holding that such an offense involves moral turpitude.

Subsequent to our last decision, the Attorney General vacated the decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). See *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015). In his decision, the Attorney General advised that the Board is no longer to apply the three-step framework of *Silva-Trevino* in determining whether an offense is or is not a crime involving moral turpitude. See *id.* However, in his decision, the Attorney General specifically stated that he does not intend to affect the Board's determinations as to whether or not an offense entails "reprehensible conduct committed with some degree of scienter," and is or is not a crime involving moral turpitude for that reason. See *id.* at 553 n.3. We acknowledge that our prior decision finding that the respondent's conviction for assault and battery with a deadly or dangerous weapon is a crime involving moral turpitude was made prior to the vacatur of *Matter of Silva-Trevino*.

However, our prior decision is based on the application of our well-established precedent decisions relating to whether particular "assault" offenses involve the necessary reprehensible conduct and degree of scienter to be crimes involving moral turpitude and is not dependent on the application of the framework set forth in *Matter of Silva-Trevino*. See *Matter of O-*, 3 I&N Dec. 193 (BIA 1948); see also *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011) (noting that "the use of a deadly weapon" is an "aggravating factor that indicates the perpetrator's moral depravity" such that the general rule that simple assaults do not involve moral turpitude does not apply); *Matter of Samudo*, 23 I&N Dec. 968, 171 (BIA 2006) ("assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the 'simple assault and battery' category.").

Therefore, our previous finding that the statute which, by definition, requires either the intentional application of force by use of a dangerous weapon and/or the intentional commission of a reckless or wanton act (defined as more than gross negligence) with a dangerous weapon resulting in physical or bodily injury that interferes with the victim's health or comfort involves moral turpitude based on the accumulation of "aggravating factors" is not affected, adversely or otherwise, by the vacatur of *Matter of Silva-Trevino*. As such, we find it unnecessary to address the respondent's arguments regarding the use of the "realistic probability" test inasmuch as our decision in this case does not rely on the application of the "realistic probability" standard.

However, we will address, and dismiss, the respondent's contention that section 15A is not a crime involving moral turpitude because a "dangerous" weapon under Massachusetts law includes common objects that are not categorized as "deadly weapons." In this regard, we do not find this to be a distinguishing factor because it is the defendant's use of the ordinary object in a dangerous manner which is the vile act. See *Commonwealth v. Tevlin*, 433 Mass. 305 (Mass. Sup. Ct. 2001) (whether a weapon is found dangerous depends on the characteristics of the object, the way in which the defendant manipulated it, and the details surrounding the assault and the use of the instrument). Further, the requirement of a "dangerous" weapon, rather than "deadly" weapon, does not alter our conclusion because "dangerous" still invokes a high level of potential harm that takes the nature of the offense outside that of a simple assault. See *United States v. Hart*, 674 F.3d 33, 42-43 (1st Cir. 2012) (an otherwise innocent instrument is considered a dangerous weapon if, "as used by the defendant, [it] is capable of producing serious bodily harm") (internal citations and quotation marks omitted); see also *Commonwealth v. Appleby*, 380 Mass. 296 (Mass. Sup. Ct. 1980) (explaining that the criminal law of assault and battery by a dangerous weapon expresses society's desire to punish the use of an instrument capable of producing serious bodily harm).

Accordingly, the motion will be denied.

ORDER: The motion is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

SEP - 9 2015

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATIONS: Reopening; remand

This case was last before us on September 22, 1998, when we entered a final administrative order dismissing the respondent's appeal. On June 2, 2015, the respondent submitted the instant motion to reopen and remand pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security (DHS) has not responded to the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) based on (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent, a native and citizen of China, applied for (b) (6). (b) (6) The Immigration Judge found that he was not credible. The respondent seeks to have his deportation proceedings reopened to apply for (b) (6) in China, his marriage and the birth of his three children in the United States, and a claim of (b) (6) in China.

He offers his (b) (6) application, statement, and marriage certificate, his wife's naturalization certificate, his children's birth certificates, and the paternity test results for the children indicating the probability that he is their father.

He also offers correspondence from his counsel, the Nationality Law of the People's Republic of China, the 1999 Chang Le City Family Planning Q&A Handbook, the Langqi Town Family Planning Q&A Handbook, the Ying Qian Town Family Planning Q&A Handbook, a

2003 Consular Information Sheet, a 2003 Administrative Decision of the Fujian Province Family Planning Administration, a 2005 Lianjiang County Quantou Township Committee Official Directive, Responses to Information Requests from the Immigration and Refugee Board of Canada, Responses from the Refugee Review Tribunal of Australia, inquiries and responses from the Mei Hao Jia Yuan website, the Fuzhou Call Center for the Convenience of the People, and the Fujian Province Population and Family Planning Committee, documents that purport to be from the Changle City Population and Family Planning Leadership Group, the Chinese Communist Party Chang Le City Shou Zhan Township Committee, the Shou Zhan Township Population and Family Planning Leadership Group, the Jin Feng Township Population and Family Planning Leadership Group, the Family Planning Leading Group of Tantou Town, the Lian Jiang County Population and Family Planning Leadership Group, and the Fuzhou City Mawei District Tingjiang Town People's Government, reports and regulations from Quanzhou City Rural Area, Guhuai Town, Changle localities, Langqi Town, Cangshan District, Long Tian Township, Quantou Town, Xiuyu District, Xiang An, Guangze County, Zhangpu County, Nanyang Town, Sha County, and Ying Qian Town, responses to Freedom of Information Act (FOIA) requests and a FOIA appeal, portions of 2002 and 2004 State Department reports, a 2007 report of investigation by the U.S. Citizenship and Immigration Services, portions of the 1998, 2004, 2005, and 2007 Country Profiles on China, portions of the 1994, 1995, 2012, and 2013 Country Reports on China, portions of the 2009 - 2014 Annual Reports of the Congressional-Executive Commission on China (CECC), evidence submitted in unrelated asylum cases, an affidavit and vita of (b) (6) in Germany, the opinion and vita of (b) (6), research articles, and media reports.¹

The respondent contends that his evidence shows "a drastic increase of (b) (6) (b) (6) throughout China, and more specifically in (b) (6) and Respondent's hometown." Motion at 7. He claims that there is the (b) (6) and (b) (6) the use of (b) (6) there have been continuing reports of (b) (6) in some areas, and that the use of (b) (6) *Id.* at 2, 19-26, 46-47.

He reports that according to (b) (6) in China, a (b) (6) (b) (6). See Exhibit A, statement. He contends that since he and his wife already have (b) (6) and that if he is removed to China at this time, he will be (b) (6) (b) (6) *Id.*

¹ The respondent submits two groups of exhibits, both of which contain exhibits labeled A-J. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits.

(b) (6)

The instant case arises in the jurisdiction of the United States Court of Appeals for the Second Circuit, and we decline to apply the decisions that the respondent cites from outside of the Second Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he has not established his prima facie eligibility for relief. *See Matter of S-Y-G-*, *supra* (a motion to reopen based on (b) (6) must also demonstrate that the respondent is prima facie eligible for the requested relief).

We find that the evidence regarding past and current conditions in China (b) (6) is not sufficient to demonstrate a (b) (6) since the time of the respondent's hearing in 1994. The evidence reflects that social compensation fees, loss of job, promotion, and education opportunity, expulsion from the party, destruction of property, and other administrative measures continue to be used to (b) (6). *See, e.g.,* Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII; Exhibit BBBB at 26-27, 99-103; Exhibit CCCC at 18-19, 90-93; Exhibit DDDD at 22-23, 110-114; Exhibit EEEE at 54-57; Exhibit FFFF at 56-59; Exhibit HHHH at 28-29, 103-106. Moreover, the evidence indicates that alleged (b) (6) in some areas of China have been a (b) (6), including the time of the respondent's 1994 proceedings. *See, e.g.,* Exhibit XXX, § VII. While some of the documents offered by the respondent announce renewed efforts to (b) (6) that have been in place since the 1980s, they do not describe a (b) (6) or (b) (6). *See, e.g.,* Exhibit U (response to a 2008 inquiry from (b) (6) on the website of the (b) (6) Province); Exhibit MM-OO, Jin Feng Township Reports; Exhibits RR-TT, Tantou Town Notices. At most, these reports reflect that (b) (6) vary from locale to locale and fluctuate incrementally from time to time. *See e.g.,* Exhibit X, Quanzhou City Rural Area Report; Exhibit CC-FF, PP, and PPP, Changle City Population and Family Planning Bureau Notices and Announcements; Exhibit GG-II, Shou Zhan Township Committee Announcements; Exhibits KK-LL, Ying Qian Town Notices; Exhibits UU-WW, Langqi Town Reports; Exhibits AAA-DDD and FFF-HHH, Guantou Town Reports. We conclude that the evidence is not adequate to demonstrate (b) (6) in the (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Shao v. Mukasey, supra*. The evidence reflects that China regards a child of Chinese nationals who have not permanently settled in another country as a Chinese national, and that there have been reports of (b) (6) in some areas of China contrary to the (b) (6). *See, e.g.,* Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII; Exhibit BBBB at 26-27, 99-103; Exhibit CCCC at 18-19, 90-93; Exhibit DDDD at 22-23, 110-114; Exhibit EEEE at 54-57; Exhibit FFFF at 56-59; Exhibit HHHH at 28-29, 103-106. However, it is not sufficient to prima facie establish the likelihood that the respondent in this case will be (b) (6).

(b) (6)

amounting to (b) (6) upon his return to China under (b) (6) because the evidence does not indicate the likelihood of such (b) (6) in the United States. *Id.*; see *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012) (U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations); *Matter of S-Y-G-*, *supra*.

The respondent is from (b) (6). We give limited weight to the documents he offers that were submitted in (b) (6) cases of persons from other areas of China who are not related to him because he has not shown that they are material to his claim nor demonstrated that the circumstances in those cases are the same as the circumstances in his case. See Exhibits QQQ, RRR, GGGG.

The opinion of (b) (6) regarding the enforcement of the (b) (6) in China does not support the respondent's claim of (b) (6). (b) (6) states that "its (b) (6) continues to vary across space and time." See Exhibit B, statement, ¶ 6. He does not identify any document or evidence that he consulted for his "own research" on the practice of (b) (6), other than pages 103-104 of the 2014 Annual Report of the CECC, and "recent online reports (2014-2015)" for his conclusions regarding (b) (6). *Id.*, ¶¶ 7-8. His opinion regarding the (b) (6) (b) (6) in China does not cite instances of (b) (6) in the United States. Therefore, we are unable to accord weight to his opinion that the respondent is a (b) (6). *Id.*, ¶ 8.

(b) (6) affidavit sets forth her opinion as to the authenticity of several of the respondent's foreign documents. See Exhibit JJ. However, her opinion speculates as to the credibility of the authors and the circumstances under which the documents were created, and we do not find it to be persuasive.

The respondent has not demonstrated that he would be (b) (6). (b) (6). See (b) (6) (BIA 2007) (a showing of (b) (6) amounts to (b) (6) but a showing of (b) (6) does not amount to (b) (6) where the record contains scant information concerning the respondent's financial situation). He has not offered information to establish his current financial situation nor adequate evidence to demonstrate that he would (b) (6) in China. See (b) (6) (2d Cir. 2014) (discussing the circumstances under which (b) (6)).

The respondent has not made a prima facie showing that (b) (6) (b) (6) upon his return because his evidence does not indicate a likelihood of (b) (6). See (b) (6).

We conclude that the respondent has not met the requirements of 8 C.F.R. § 1003.2(c)(3)(ii). His evidence is not sufficient to establish a (b) (6).

(b) (6)

or country conditions "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6) (b) (6) (2d Cir. 2005); (b) (6)

(b) (6) (BIA 2006). He has not satisfied his burden to demonstrate that his deportation proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Dallas, TX

Date: JUN 06 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

Before us for decision is the respondent's motion to reopen seeking an opportunity to apply for (b) (6) to El Salvador, and (b) (6).¹ The motion will be denied.

The instant motion is untimely because it was filed April 19, 2016, 19-1/2 years after the September 30, 1996, filing deadline that applies in this case. 8 C.F.R. § 1003.2(c)(2) (providing that a motion to reopen must be filed no later than 90 days after the date the final administrative decision was rendered, or on or before September 30, 1996, whichever is later); September 14, 1990, I.J. dec. (final administrative decision). This motion is also number barred. 8 C.F.R. § 1003.2(c)(2); October 23, 2012, I.J. dec. (as served October 25, 2012), and December 16, 2013, and March 4, 2015,² Board decisions (respectively denying the respondent's three previous motions to reopen).

The respondent, however, urges that the late filing of his motion should be excused based on (b) (6). Motion to Reopen (Motion) at 3-5; section 240(c)(7)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii). The respondent is a (b) (6) year-old citizen of El Salvador who has not returned to his homeland since his initial entry in (b) (6) 1990. In moving to reopen, he contends that (b) (6), Salvadorans (b) (6), and (b) (6) in the United States. It is also asserted that (b) (6) of El Salvador has been (b) (6). Motion at 2, 4-5; Exhs. A-D, F.

¹ The respondent did not apply for (b) (6) during his deportation hearing, which concluded September 14, 1990.

² On May 18, 2016, the United States Court of Appeals for the Fifth Circuit denied the respondent's petition for review of this Board decision. (b) (6) (5th Cir. 2016).

In addition, the respondent contends that after learning that he had been sending money to a cousin, (b) (6) in El Salvador (b) (6). It is explained that this cousin (b) (6) 2015. The respondent (b) (6), and in light of (b) (6) as reported in the material now submitted. Motion at 3, 4; Exhs. A-D, F (country condition material), Exh. E (regarding the respondent's cousin's (b) (6) Exh. G (Form (b) (6), pp. 5-8).

To support his claims of (b) (6), the respondent has submitted media articles and other material reporting on conditions of (b) (6) in El Salvador. However, the respondent has not compared, in any meaningful way, these conditions with those in existence at the time of his last hearing in September 1990, as relating to his current (b) (6) claims. Therefore, he has not shown that the conditions reported in the submitted background material are indicative of (b) (6), such that the late filing of his motion might potentially be excused pursuant to the (b) (6) based on this evidence.

As to the claims regarding the respondent's cousin, documentation has been submitted confirming that (b) (6), 2015. Motion, Exh. E. However, no evidence from any source in El Salvador has been provided detailing the (b) (6), including why this cousin (b) (6). The respondent has no personal knowledge of such details because he was in the United States at the time. Moreover, no sworn statements or other evidence from anyone in El Salvador having such knowledge has been submitted, including from the respondent's family members. Therefore, it has not been persuasively demonstrated that (b) (6) the respondent's cousin constitutes (b) (6) in El Salvador that materially affects the respondent's current eligibility for the relief he seeks.³

To the extent the respondent's (b) (6) is premised on the conditions of (b) (6) in El Salvador, such conditions affecting the populace as a whole do not establish eligibility for (b) (6). (b) (6) (BIA 1987). The respondent's current submissions also do not demonstrate, prima facie, that (b) (6) eligibility. (b) (6)

³ In addition, the respondent has not identified or discussed the part of the submitted material that addresses and supports his specific claims that (b) (6) in the United States." Motion at 4.

Based on the foregoing considerations, the respondent's motion to reopen will be denied as untimely and number barred. The request for a stay of deportation pending adjudication of his motion to reopen will be denied as moot.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of deportation pending adjudication of the respondent's motion to reopen is denied as moot.

Molly Rudell Clark
FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Miami, FL

Date: APR 11 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: George Giosmas, Esquire

ON BEHALF OF DHS: Maria T. Armas
Assistant Chief Counsel

APPLICATION: Reopening; reconsideration

On June 9, 2003, the Immigration Judge ordered the respondent's deportation to Colombia after finding that she had abandoned her applications for relief because she did not file the applications by May 2, 2003.¹ On August 11, 2004, the Board dismissed the respondent's appeal from the Immigration Judge's June 9, 2003, decision, and on October 5, 2004, we denied the respondent's motion to reconsider our August 11, 2004, decision. This case was last before the Board on February 10, 2016, when we denied the respondent's untimely motion to reopen. The respondent has now filed a timely motion to reconsider our February 10, 2016, decision. *See Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); 8 C.F.R. § 1003.2(b). To the extent that the respondent seeks to offer additional evidence for our consideration, the instant motion is also construed as an untimely, number-barred motion to reopen. *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security opposes this motion. The motion will be denied.

The respondent has not shown that we erred as a matter of fact or law in our prior order denying her motion to reopen. *See Matter of O-S-G-*, *supra*. In her prior motion, which was untimely by more than 11 years, the respondent raised an ineffective assistance of counsel claim against her former attorney. We found, however, that equitable tolling of the filing deadline was not warranted because the motion demonstrated neither that the respondent suffered prejudice as a result of her former attorney's alleged deficient performance, nor that she exercised due diligence in bringing her ineffective assistance of counsel claim before the Board. *See Avila-Santoyo v. U.S. Attorney General*, 713 F.3d 1357, 1362-65 (11th Cir. 2013); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1274 (11th Cir. 2004).

¹ On May 1, 1998, the Immigration Judge found the respondent deportable as charged, and denied her applications for a waiver of inadmissibility and (b) (6) under former sections 212(c) and section (b) (6) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(c) and (b) (6). The respondent appealed, and on September 27, 2001, the Board remanded the record to the Immigration Judge to enable the respondent to reapply for the section 212(c) waiver and (b) (6).

The respondent now argues that “through no fault of her own, [she] was never able to present her very winnable 212(c) waiver or her withholding case in Court.” *See* Respondent’s Motion at 2. It is well established, however, that if an application or supportive documentation is not filed within the time set by the Immigration Judge, the opportunity to file that application shall be deemed waived. *See Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992) (“The Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them”); 8 CF.R. § 1003.31(c) (“If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived”). In the respondent’s case, the Immigration Judge afforded her a full and fair opportunity to prepare and submit the applications for relief.

As noted in our prior order, the respondent was present with her former attorney when the Immigration Judge instructed her to file the applications by May 2, 2003. The attorney subsequently withdrew her representation prior to the deadline. Although the respondent asserts that the attorney did not inform her of the intention to withdraw representation, or that representation had been withdrawn, the respondent has not satisfactorily challenged the basis of the attorney’s motion to withdraw, i.e., the attorney’s repeatedly unsuccessful attempts to contact the respondent. As the respondent’s former attorney no longer represented her on May 2, 2003, the failure to file the applications on or before that date has not been shown to be the result of ineffective assistance of counsel.

Further, the respondent has not satisfactorily challenged our finding with regard to due diligence. In the instant motion, the respondent reiterates her assertion that she was unaware of the deportation order. *See* Respondent’s Motion at 9. Nevertheless, she has neither indicated when it was, during the 11-year period she seeks to toll, that she became aware of the alleged ineffective assistance of counsel, nor shown when she finally attempted to seek information regarding the status of her case.

In sum, we remain unpersuaded that equitable tolling is warranted in this case.² In the instant motion, the respondent further argues that she is not guilty of the criminal offense underlying her deportability. The respondent has also offered additional evidence, including affidavits attesting to her character, equities acquired in the United States, and the putative hardship to the respondent and her family as the result of deportation. We emphasize, however, that the respondent’s conviction remains viable for immigration purposes unless and until it is overturned by a criminal court. *See Matter of Ponce de Leon*, 21 I&N Dec. 154 (A.G. 1997; BIA 1997, 1996). We also note that the documentation offered with the respondent’s motions does not include evidence reflecting (b) (6) in Colombia to support reopening for (b) (6) pursuant to (b) (6) (BIA 2007) (noting that it is the respondent’s heavy burden to show, *inter alia*, that the proffered evidence is material and reflects (b) (6) arising in the

² New evidence that the respondent’s former attorney has been subject to disciplinary action would not affect this finding, as it has not been shown that the adverse action against the attorney was in any way related to the attorney’s representation of the respondent in these proceedings.

country of nationality). Finally, we acknowledge that the respondent has strong ties to the United States, including ties acquired after the initiation of these proceedings in 1996. We also recognize that deportation will likely result in hardship. Nevertheless, the instant motion does not demonstrate an exceptional situation to warrant the exercise of the Board's limited sua sponte authority to reopen the proceedings or to reconsider a prior Board order. *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) ("As a general matter, we invoke our sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations"). Accordingly, the respondent's motion to reopen and reconsider will be denied.

ORDER: The motion to reopen and reconsider is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) 09 – San Diego, CA

Date:

JUN 20 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Anni-Michele Z. Jean-Pierre, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: (b) (6)

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's January 14, 2016, decision denying his applications for (b) (6) under section (b) (6) of the Immigration and Nationality Act, (b) (6); (b) (6) under section (b) (6) of the Act, (b) (6); and (b) (6).¹ The respondent's request for oral argument is denied; his request for a waiver of the appellate filing fee is granted. See 8 C.F.R. §§ 1003.1(e)(7), 1003.8(a)(3). The Immigration Judge's decision will be affirmed, and the appeal will be dismissed.

We review findings of fact, including credibility findings and determinations as to the likelihood of future events, under the "clearly erroneous" standard. See 8 C.F.R. § 1003.1(d)(3)(i); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. See 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent seeks (b) (6) of those in (b) (6) (I.J. at 19). Through counsel, the respondent asserted before the Immigration Judge that, as (b) (6) (I.J. at 19; Exh. 11, Brief at 3, 8). Additionally, the respondent asserted that he will be (b) (6), to include being (b) (6) in the United States (I.J. at 25; Exh. 11, Brief at 3).

¹ Although the Notice of Appeal was filed after the regulatory filing deadline, we grant the respondent's "Motion to Accept Untimely Filing" and review this case pursuant to our certification authority. See 8 C.F.R. § 1003.1(c).

On appeal, the respondent argues that the Immigration Judge erred in denying his application for (b) (6) (Notice of Appeal at 2; Respondent's Brief at 7-12).² The respondent also argues that the Immigration Judge erred in not granting administrative closure of the proceedings (Notice of Appeal at 2; Respondent's Brief at 6-7).

We find no reason to disturb the Immigration Judge's determination that administratively closing the proceedings was not appropriate under the circumstances presented (I.J. at 5-6). As the Immigration Judge observed, the respondent, who was represented by counsel during the proceedings below, did not request administrative closure (I.J. at 5). However, the Immigration Judge considered administrative closure as a potential safeguard, given that the respondent was found to be mentally incompetent for purposes of removal proceedings (I.J. at 3, 5). The respondent, on appeal, has not specified how the safeguards of assignment to a mental health docket, questioning tailored to ascertain competency, granting of continuances, and appointment of counsel were insufficient to protect his rights and privileges in removal proceedings (I.J. at 4). See *Matter of M-A-M-*, 25 I&N Dec. 474, 481 (BIA 2011) (citing section 240(b)(3) of the Act, 8 U.S.C. § 1229a(b)(3)). Rather, he contends that his "active psychotic symptoms prevented him from having meaningful access to due process because of his inability to accurately understand his proceedings and participate in them" (Respondent's Brief at 7).

We disagree with the contention that a respondent is denied due process because he or she cannot understand or meaningfully participate in removal proceedings. Instead, as discussed in *Matter of M-A-M-*, a respondent may receive a fair hearing, despite his or her inability to understand the nature and object of the proceedings, if his or her rights and privileges are adequately safeguarded. See *Matter of M-A-M-*, *supra*, at 479, 482. Aside from suggesting, through counsel, that his mental health condition affected the content of his testimony, the respondent has not specified how the safeguards applied were inadequate to ensure a full and fair hearing. To that end, he has not asserted that counsel was without sufficient, relevant information to allow for challenges to removability and claims for relief to be presented on his behalf. See (b) (6) (BIA 2015) (explaining that where (b) (6) applicant cannot provide reliable testimony, the Immigration Judge should focus on whether the applicant can meet his burden of proof based on objective evidence of record and other relevant issues).

Moreover, the respondent has not identified the particular purpose that administrative closure would serve in these proceedings. In *Matter of M-A-M-*, we noted that administrative closure could be appropriate in some cases involving incompetent aliens, "while other options are

² The respondent has not specifically challenged the Immigration Judge's determination that he is ineligible for (b) (6) for having been convicted of a particularly serious crime (I.J. at 15-17). See sections (b) (6) of the Act; (b) (6). Accordingly, we need not address the respondent's eligibility for (b) (6). See, e.g., (b) (6) (BIA 1999) (expressly declining to address an issue not raised by a party on appeal); (b) (6) (BIA 1988) (same).

explored, such as seeking treatment for the respondent.” *Matter of M-A-M-*, *supra*, at 483. Here, the respondent did not articulate, either before the Immigration Judge or on appeal, the objective that would be pursued were the proceedings to be administratively closed. Under these circumstances, we will affirm the determination that sufficient safeguards were in place in order to proceed fairly and adjudicate the respondent’s application for (b) (6) (I.J. at 3-6). Thus, notwithstanding the respondent’s appellate argument, we conclude that he has not established that he was deprived of the right to due process (Respondent’s Brief at 12). *See id.* at 479, 482; *see also Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926-27 (9th Cir. 2007) (“Where an alien is given a full and fair opportunity to be represented by counsel, to prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process.”).

Furthermore, we find no reason to disturb the Immigration Judge’s determination that the respondent did not meet his burden of proof to establish that (b) (6)

(b) (6), if removed to Mexico, due to (b) (6) (I.J. at 19-25). *See* (b) (6) (9th Cir. 2011); (b) (6) (9th Cir. 2003). On appeal, the respondent argues that evidence of record demonstrates that (b) (6)

(Respondent’s Brief at 8-10). However, the respondent has not specifically addressed the Immigration Judge’s determination that the present record does not establish the “specific intent” (b) (6) (I.J. at 22). *See* (b) (6) (“In order to constitute (b) (6) . . .”); (b) (6) (9th Cir. 2011).

The Immigration Judge found, based on background evidence in the record, including the Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Mexico Country Reports on Human Rights Practices – 2014*, that (b) (6) in Mexico (I.J. at 22-23; Exh. 11, Tab S at 397, 401-02; Exh. 12 at 29). The Immigration Judge acknowledged that the 2010 report from Disability Rights International (“DRI”), entitled “Abandoned & Disappeared: Mexico’s Segregation and Abuse of Children and Adults with Disabilities,” indicates that (b) (6)

(I.J. at 23; Exh. 11, Tab S at 390-99). The respondent points to DRI reports on appeal to support his assertion that (b) (6); however, we find no clear error in the Immigration Judge’s assessment of the relevant country conditions evidence in the record as a whole (I.J. at 22-23; Respondent’s Brief at 8-10). *See generally* (b) (6) (indicating that the Board reviews for clear error an Immigration Judge’s findings regarding the sufficiency of evidence of (b) (6)).

In that regard, we find no clear error in the determination that the present record shows that (b) (6) in the Mexican (b) (6), and thus, we will affirm the ruling that the respondent did not meet his burden of proof to establish that (b) (6)

(b) (6)

(b) (6) (I.J. at 23-24). *See generally* (b) (6) (9th Cir. 2008) (observing that (b) (6) requires the “specific intent of someone—either (b) (6)” (emphasis in original). Additionally, based on the Immigration Judge’s assessment of the evidence, we find no legal or clear factual error in the Immigration Judge’s determination that the totality of the evidence does not demonstrate that (b) (6) (I.J. at 23).

We also find no clear error in the Immigration Judge’s assessment that the respondent’s asserted (b) (6) is based on a series of suppositions, and he did not show that each hypothetical event that might lead to (b) (6) (I.J. at 24-25; Exh. 11). *See* (b) (6) (A.G. 2006) (observing that the evidence must “establish that each step in the hypothetical chain of events is more likely than not to happen”). The Immigration Judge observed that the respondent was never (b) (6) in Mexico and that, after (b) (6) (I.J. at 24). Although the respondent notes on appeal that he had not been (b) (6) prior to these proceedings, we are unpersuaded that the Immigration Judge erred in determining that he did not establish that (b) (6), given his family connections in the United States and Mexico (I.J. at 24; Respondent’s Brief at 11).

In addition, we find no reason to disturb the Immigration Judge’s determination that the respondent did not meet his burden of proof to establish that (b) (6) from the United States (I.J. at 25-26). *See* (b) (6). The Immigration Judge acknowledged the background evidence that indicates that (b) (6) (I.J. at 25-26; Exh. 11, Tab K at 212-13, Tab J at 210, Tabs L-O, Tab M at 227). However, we find no legal or clear factual error in the Immigration Judge’s determination that the evidence does not establish that (b) (6) that are tantamount to (b) (6) (I.J. at 25-26). *Cf.* (b) (6) (9th Cir. 2011) (noting that (b) (6) evidence did not, “under the *specific* circumstances of th[e] case,” establish that the applicant would be (b) (6) (emphasis in original).

Moreover, we find no clear error in the Immigration Judge’s ruling that the respondent did not establish that each of the events he asserts would (b) (6), particularly in light of the fact that he was (b) (6) because of his (b) (6) following his removals in 2010 and 2014 and was able to work in Mexico and live in several places, including with his father’s family and his aunt (I.J. at 26; Exh. 11). *See* (b) (6).

In view of the foregoing, we will affirm the Immigration Judge’s denial of the respondent’s application for (b) (6). Accordingly, the following order will be entered.

· ORDER: The decision of the Immigration Judge dated January 14, 2016, is affirmed, and the appeal is dismissed.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Houston, TX

Date:

SEP 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Anne E. Kennedy, Esquire

ON BEHALF OF DHS: Nora E. Norman
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has filed a motion to reopen, based on a Texas criminal court vacating the respondent's conviction. *See generally Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Chavez*, 24 I&N Dec. 272 (BIA 2007). The Department of Homeland Security opposes the motion, which will be granted.

The state court order indicates, inter alia, that the respondent's defense counsel did not advise him that his guilty plea may have adverse immigration consequences. Under the circumstances, we will sua sponte reopen the proceedings. On remand, the Immigration Judge may receive additional evidence appropriate to the full resolution of this matter, including additional charges of removability, if any. *See* 8 C.F.R. §§ 1003.30 and 1240.10(e). Accordingly, the record will be remanded to the Immigration Judge for further consideration of the respondent's removability in light of the evidence of the vacated conviction, and for further consideration of the respondent's eligibility for relief.

ORDER: The respondent's removal proceedings are reopened.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with this order.



FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) – New York, NY

Date: FEB 12 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ira J. Kurzban, Esquire

ON BEHALF OF DHS: Wen-Ting Cheng
Chief Counsel

APPLICATION: Reconsideration; reopening

The respondent has filed a motion for sua sponte reconsideration and/or reopening of his deportation proceedings, pursuant to 8 C.F.R. § 1003.2(a).¹ The Department of Homeland Security (DHS) has filed a brief in opposition to the motion, and the respondent has filed a reply to the DHS's opposition brief.

The factual and procedural history of this case is protracted and known to the parties, and will only be discussed insofar as is pertinent to our present decision on this motion. The respondent entered the United States as a lawful permanent resident in April 1976 when he was an (b) (6) child. He was placed in these deportation proceedings by the former Immigration and Naturalization Service (INS) as a result of his (b) (6) 1991 convictions under New York penal law for attempted murder and firearms offenses for which he was sentenced to term of imprisonment of 3 1/3 to 10 years.² He was charged with being deportable for being convicted of an aggravated felony under former section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(iii) (1994), and for being convicted of a firearms offense under former section 241(a)(2)(C) of the Act.

An Immigration Judge found the respondent deportable as charged, but terminated his deportation proceedings after granting him a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (repealed 1996), with respect to his aggravated felony charge, and granting his application for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. The INS appealed from that decision. On November 7, 1995, the Board

¹ The respondent's motion also addresses the separate removal proceedings that were conducted against him in the Immigration Court in Bradenton, Florida. A separate order will be issued in the respondent's removal proceedings this same date.

² The respondent was granted temporary release status ("Work Release") in (b) (6) 1993 as a result of his "good behavior" while incarcerated. His release was terminated in (b) (6) 1993 not because of any misconduct on his part, but apparently because it was determined that his immigration status made him ineligible for that program.

dismissed the INS's appeal from the Immigration Judge's decision. On March 26, 1997, however, the Board granted the INS's motion for reconsideration and, without remanding the case for further fact-finding, vacated the November 7, 1995, Board decision. The Board concluded that the respondent had not been eligible for section 212(c) relief at the time we issued our November 7, 1995, decision based on evidence presented by the INS with its motion to reconsider reflecting that as of October 19, 1995, the respondent had served 5 years and 14 days in prison. We ordered the respondent deported to United Kingdom, his country of nationality. On (b) (6), 1998, the United States Court of Appeals for the Second Circuit dismissed the respondent's petition for review of the Board's March 26, 1997, decision for lack of jurisdiction.

Sometime in 2002, the respondent briefly departed the United States on a business trip. Upon seeking reentry to this country in Miami, Florida, he was placed in removal proceedings as an arriving alien, largely due to the existence of his prior deportation order and its underlying circumstances. The respondent ultimately was ordered removed by an Immigration Judge in a decision that was affirmed by the Board, without opinion, on November 25, 2002. A petition for review of that Board decision is pending before the United States Court of Appeals for the Eleventh Circuit.

Thereafter, on (b) (6), 2003, the United States District Court for the Southern District of New York vacated our March 26, 1997, deportation order after concluding that it was entered in violation of the respondent's due process rights. The court noted in part that the "new" evidence that INS presented after the Board's November 7, 1995, decision had not been offered by the government in a timely manner and the Board's consideration of that evidence violated the restrictions placed by regulation on the Board's authority to grant motions to reconsider. The district court then reinstated our original November 7, 1995, decision, which had dismissed the INS's appeal from the Immigration Judge's grant of adjustment of a status in conjunction with a 212(c) waiver. See (b) (6) (S.D.N.Y.). As a result of this decision, the DHS issued the respondent a new "green card" and permitted him to exit and re-enter the country as a lawful permanent resident on several occasions.

However, some three years later, the United States District Court judge's order was vacated by the United States Court of Appeals for the Second Circuit based on intervening statutory law that divested the district court of jurisdiction to entertain challenges to removal or deportation orders. See (b) (6) (2d Cir. Sept. 20, 2006). The Second Circuit converted the respondent's habeas petition into a petition for review, and then transferred the petition for review to the Eleventh Circuit.³

Then on (b) (6), 2008, the respondent received a full and unconditional pardon by the then-governor of New York of all of the convictions underlying his final order of deportation. The Governor urged that the respondent be granted relief from deportation.

³ We also note that the respondent filed a petition for de novo review of the denial of his petition for naturalization with the United States District Court for the Southern District of New York. That petition was dismissed on (b) (6), 2016.

The instant motion and related filings advance many arguments regarding the propriety of the Board's previous actions and the appropriate ultimate disposition of this case. Relying on the departure bar regulation at 8 C.F.R. § 1003.2(d) and *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010), the DHS initially contests our authority to reopen these proceedings sua sponte due to the respondent's brief departure from the country in 2002, after we issued our March 26, 1997, deportation order against him. However, as discussed below, we deem subsequent events in this case to have rendered the basis of our March 26, 1997, deportation order moot. As such, and under the unusual facts and posture of this case, we are not persuaded that we lack jurisdiction to exercise our sua sponte authority in these proceedings.

On March 26, 1997, our sole basis for revisiting our affirmance of the respondent's grant of adjustment of status was our conclusion that the respondent in fact had not been eligible for a section 212(c) waiver of his aggravated felony charge at the time of the Board's November 7, 1995, decision because the respondent had served more than 5 year's incarceration by that date while the INS's appeal was pending before the Board. However, we deem any issues pertaining to the respondent's eligibility for section 212(c) relief moot because the (b) (6) 2008 gubernatorial pardon of the respondent's 1991 convictions, which formed the basis for his deportability, served to eliminate those convictions for immigration purposes. See former section 241(a)(2)(A)(iv) of the Act. Further, the respondent is not inadmissible as an alien convicted of a crime involving moral turpitude, as the DHS asserts, because the pardon also effectively eliminated such inadmissibility. Nor, as we found in our November 7, 1995, decision, does possible inadmissibility based on the 1988 firearms conviction bar adjustment. See *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). Due to the pardon, a 212(c) waiver is no longer necessary as it relates to the respondent's 1991 convictions, including the aggravated felony charge.

At the time of our November 7, 1995, decision, we reviewed the record then before us, and the arguments made by the INS, and we affirmed the Immigration Judge's grant of relief. Nothing the DHS has pointed to in opposing the respondent's present motion persuades us that the respondent was ineligible for adjustment of status, or undeserving of such relief in the exercise of discretion. Had the full gubernatorial pardon been granted at the time of the respondent's deportation hearing, or at the time of our 1997 decision, there would have been nothing to prevent the respondent from being granted adjustment of status. And, the pardon would have strengthened the Immigration Judge's and our decision to grant discretionary relief.

The DHS continues to argue that the respondent is undeserving of relief in the exercise of discretion, but largely refers to the adverse matters considered by the Immigration Judge and the Board some two decades ago. The Immigration Judge found that the respondent had been rehabilitated and merited discretionary relief at that time. In our decision of November 7, 1995, we also found that the respondent was rehabilitated and that his equities outweighed the adverse factors. Both decisions discussed in detail the many favorable considerations present in this case. The fact that the then-detained respondent was granted relief was extraordinarily unusual and speaks to the unusual facts and circumstances that were presented in this case. If anything, the intervening years have shown that judgment to have been correct, and we are not persuaded that any basis has been shown for reversing that discretionary determination.

Considering the totality of the circumstances, we will sua sponte reconsider and vacate our March 26, 1997, decision in these proceedings. Doing so leaves in place our November 7, 1995, decision that upheld the Immigration Judge's grant of adjustment of status to the respondent and his termination of these deportation proceedings. The respondent, therefore, is considered to have retained his status as a lawful permanent resident of the United States. The following orders will be entered.⁴

ORDER: The motion for sua sponte reconsideration of the Board's March 26, 1997, decision in these proceedings is granted and that decision is vacated.

FURTHER ORDER: The Board's decision dated November 7, 1995, is reinstated and the government's appeal from the decision of the Immigration Judge granting of the respondent's application for adjustment of status and ordering his deportation proceedings terminated remains dismissed.

A handwritten signature in black ink, appearing to read "D. B. Holmes", is written over a horizontal line.

FOR THE BOARD

⁴ The parties should advise the United States Court of Appeals for the Eleventh Circuit of the entry of the Board's decisions in this case.

Falls Church, Virginia 22041

File: (b) (6) – Batavia, NY

Date:

FEB 29 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Michael G. Dreher
Assistant Chief Counsel

APPLICATION: Reopening; reconsideration

The respondent has filed a timely motion requesting the Board reconsider our decision of December 31, 2015, dismissing his appeal. He also seeks reopening on the basis of ineffective assistance of counsel. The Department of Homeland Security opposes the respondent's motion. The respondent's motion will be denied.

A motion to reconsider must establish an error of fact or law in the decision for which reconsideration is being requested. 8 C.F.R. § 1003.2(b)(1). The respondent argues that the Board erred in stating "that the records established a Youthful Offender conviction for the crime of arm robbery," as his youthful offender conviction was not for armed robbery (Motion to Reconsider at 6). However, the Board actually stated that the respondent "was found to be a youthful offender [...] as a consequence of an armed robbery" (Board Decision of Dec. 31, 2015, at 1).

The Board did not err in considering the conduct which underlay the respondent's youthful offender status, even if it did not result in a conviction for armed robbery. *See, e.g., Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988) (advising that in cases involving discretionary relief, all relevant factors concerning criminal history, including arrests not resulting in a conviction, and information contained in police reports should be considered). The request for reconsideration will be denied.

A motion to reopen must establish the existence of new, previously unavailable evidence. 8 C.F.R. § 1003.2(c)(1). In addition, the party requesting reopening bears the burden of demonstrating that the new evidence would likely impact the outcome of the proceedings. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). In the context of a motion to reopen on the basis of ineffective assistance of counsel, the alien must establish that prior counsel's conduct was deficient and that the deficiencies prejudiced the alien, and to this end must comply with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 688 (BIA 1988). The respondent's motion has substantially complied with the requirements of *Matter of Lozada*.

We are not persuaded that the respondent was prejudiced in this case. The respondent argues that prior counsel neglected to present additional tax records, did not inform the respondent's

daughter of the hearing date such that she could provide testimony, and did not submit evidence of the respondent's registration with the Selective Service. However, the respondent did not submit this evidence in the company of his motion. While he has submitted a letter from his daughter indicating that she was not provided with the date of the hearing, the letter does not indicate the contents of the testimony she would have given had she been present.

Additionally, the Board had considered substantially similar evidence submitted by the respondent on appeal, including a letter from the respondent's daughter, (b) (6), and documents regarding the respondent's employment history. The Board concluded that even upon taking into account the additional evidence the respondent did not establish he warranted a favorable exercise of discretion. 8 C.F.R. § 1003.1(d)(3) (on appeal the Board reviews issues of discretion de novo). Consequently, the motion to reopen will be denied.

ORDER: The respondent's motion is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) New York, NY

Date: MAR 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Paul B. Grotas, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] -
Convicted of firearms or destructive device violation

APPLICATION: Cancellation of removal; reopening

The respondent, who is a native and citizen of Guyana and a lawful permanent resident ("LPR") of the United States, appeals from the Immigration Judge's decision of October 5, 2015, which found him removable for having been convicted of certain firearms offenses, and denied his application for cancellation of removal for certain permanent residents. Sections 237(a)(2)(C) and 240A(a)(1) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1227(a)(2)(C), 1229b(a)(1). In conjunction with his appeal, the respondent filed a motion to reopen seeking a remand of his proceedings. The Department of Homeland Security ("DHS") has not responded to the appeal or the motion. The appeal will be dismissed. The motion to reopen will be denied.

The Board reviews for clear error Immigration Judges' findings of fact, including credibility determinations. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the Immigration Judge's decision. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The Immigration Judge's factual findings are not clearly erroneous. See 8 C.F.R. § 1003.1(d)(3)(i); *Matter of J-Y-C*, 24 I&N Dec. 260, 263 (BIA 2007) (holding that a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence).

On appeal, the respondent argues that the Immigration Judge erred in failing to consider his motion to amend his pleadings based on a claim of ineffective assistance of counsel (Respondent's Appeal Br. at 8). However, the Immigration Judge properly declined to consider the respondent's motion to amend his pleadings (I.J. at 3 n.3). The record does not establish that the respondent's original admissions and his concession to the charge that he was subject to removal for having been convicted of certain firearms offenses was the result of ineffective assistance of counsel (see Tr. at 6-7, 12-14, 55-56).

Further, the respondent has not complied with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (Respondent's Appeal Br. at 8). *See Twum v. INS*, 411 F.3d 54, 59 (2d Cir. 2005) ("[U]nder *Lozada*, a respondent seeking relief from an order of deportation or exclusion on the basis of ineffective assistance of counsel must submit: (1) an affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in this regard; (2) proof that the alien notified former counsel of the allegations of ineffective assistance and allowed counsel an opportunity to respond; and (3) if a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien filed a complaint with any disciplinary authority regarding counsel's conduct and, if a complaint was not filed, an explanation for not doing so."); *Esposito v. INS*, 987 F.2d 108, 110-11 (2d Cir. 1993) (citing *Matter of Lozada*, *supra*).

The respondent's assertion in his motion to amend pleadings that he contacted his former counsel by telephone regarding the allegations made against him and requested that he provide a statement does not constitute proof that he contacted his former counsel to inform him of the allegations against him or that his former counsel was given the opportunity to respond (*see* Respondent's June 30, 2015, motion to amend pleadings; Tr. at 55-58). *Matter of Lozada*, *supra*.

Further, the respondent has not shown, nor does the record indicate, that any "egregious circumstances" existed such that he should not be bound by his attorney's actions, and that the record should be remanded. *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986); 8 C.F.R. § 1240.10(c). In absence of "egregious circumstances," the respondent is bound by the "reasonable tactical decisions of his counsel." *Matter of Gawaran*, 20 I&N Dec. 938, 942 (BIA 1995) (citing *Matter of Velasquez*, *supra*, at 383); *see also Matter of B-B-*, 22 I&N Dec. 309, 310 (BIA 1998); *Matter of Lozada*, *supra*. Thus, the respondent is bound by his attorney's concession to the charge that he was subject to removal for having been convicted of certain firearms offenses.

Further, although the respondent contends that the Immigration Judge should have terminated proceedings, we uphold the Immigration Judge's determination that the DHS met its burden to establish that the respondent is removable based on the conviction records showing that he plead guilty in 2002 to having committed two felony state firearms offenses (I.J. at 2-5; Respondent's Appeal Br. at 6; Exh. 2, Tabs B-C). 8 C.F.R. § 1240.8(a). The court summary and a docket entry submitted by the DHS show that the respondent plead guilty to carrying a firearm without a license in violation of 18 Pa. Const. Stat. § 6106(a)(1), and to altering/obliterating a mark of identification in violation of 18 Pa. Const. Stat. § 6117(a), which constitute felonies under Pennsylvania's Uniform Firearms Act (I.J. at 3-4; Exh. 2, Tabs B-C). Further, the respondent conceded that he plead guilty to the charges in his conviction records (Tr. at 6-7, 12-14, 55 56).

Contrary to the respondent's assertion on appeal, the Immigration Judge did not err in relying on the conviction records provided by the DHS (Respondent's Appeal Br. at 6). A docket entry from court records that indicates the existence of a conviction, as described in section 240(c)(3)(B)(iii) of the Act, is not required to be certified by a criminal court. *Matter of J. R. Velasquez*, 25 I&N Dec. 680, 684 (BIA 2012).

Insofar as the respondent contests the authenticity of the records of conviction, the test for admission of evidence generally in immigration proceedings is whether the evidence is probative and its admission is fundamentally fair (Exh. 2; Respondent's Br. at 5, 9). *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011); *Matter of J. R. Velasquez*, *supra*, at 683. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure are binding in immigration proceedings. *Matter of Velasquez*, *supra*. The relevant question in terms of the admission of criminal records is whether the criminal records correctly reflect the facts. *Matter of Gutnick*, 13 I&N Dec. 412, 416 (BIA 1969). Here, the conviction records are the type authorized by the statute and the regulations. Section 240(c)(3)(B) of Act; 8 C.F.R. §§ 287.6(a), 1003.41. Thus, they are admissible as evidence to prove the respondent's convictions.

Further, contrary to the respondent's argument on appeal, the Immigration Judge correctly determined that his guilty plea under 18 Pa. Const. Stat. § 6106(a)(1) (2002) was categorically for a firearms offense under section 237(a)(2)(C) of the Act that rendered him removable (Respondent's Appeal Br. at 17; I.J. at 1-5). *Lanferman v. BIA*, 576 F.3d 84, 92 (2d Cir. 2009). The respondent conceded that 18 Pa. Const. Stat. § 6106(a)(1) is not divisible (I.J. at 5 n.5; Respondent's Appeal Br. at 17). Thus, the Immigration Judge properly considered only the statutory elements of 18 Pa. Const. Stat. § 6106(a)(1), and compared them to the statutory elements of section 237(a)(2)(C) of the Act. *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014)

A firearms offense under section 237(a)(2)(C) of the Act involves carrying any weapon which is a firearm, as defined under 18 U.S.C. § 921(a). Under 18 U.S.C. § 921(a)(3)(A), the term "firearm" means "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." However, the term does not include antique firearms.¹ 18 U.S.C. § 921(a)(3)(A).

According to 18 Pa. Const. Stat. § 6106(a)(1), "any person who carries a firearm . . . without a valid and lawfully issued license . . . commits a felony of the third degree." The term "firearm" under Pennsylvania's Uniform Firearms Act is defined as "[a]ny pistol or revolver with a barrel length less than 15 inches, any shotgun with a barrel length less than 18 inches or any rifle with a barrel length less than 16 inches, or any pistol, revolver, rifle or shotgun with an overall length of less than 26 inches." 18 Pa. Const. Stat. § 6102. Although 18 Pa. Const. Stat. § 6118(c) defines

¹ Under 18 U.S.C. § 921(a)(16), the term "antique firearm" means (A) "any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or (B) any replica of any firearm described in subparagraph (A) if such replica (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition."

the term antique firearm, section 6106(a)(1) does not provide an exception for antique firearms.² Further, the term antique firearm does not include muzzle loading rifles, shotguns, or pistols (“muzzleloaders”). 18 Pa. Const. Stat. § 6118(c).

The respondent contends that 18 Pa. Const. Stat. § 6106(a)(1) is overbroad in that it does not provide an exception for antique firearms. However, a conviction under a state firearms law that lacks an antique firearm exception only fails the categorical inquiry if there is a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. *Matter of Chairez, supra* (holding that where an alien did not demonstrate that he or anyone else was successfully prosecuted for discharging an “antique firearm” under a state statute which contained no exception for “antique firearms” as defined by 18 U.S.C. § 921(a)(16), the statute was not shown to be categorically overbroad relative to section 237(a)(2)(C) of the Act). *See also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013) (holding that a conviction under a state firearms law that lacks an antique firearm exception would only fail the categorical inquiry if there is “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.”).

At his hearing before the Immigration Judge, the respondent did not present evidence that he was convicted for carrying an antique firearm or that in Pennsylvania there was “a realistic probability” that someone would be convicted under 18 Pa. Const. Stat. § 6106(a)(1) for carrying an antique firearm. Therefore, the Immigration Judge did not err in finding that the respondent was removable for having plead guilty to an offense that categorically constitutes a firearms offense under section 237(a)(2)(C) of the Act. *Matter of Chairez, supra*.

We also concur in the Immigration Judge’s determination that the respondent did not meet his burden to establish that he satisfied the eligibility requirements for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a) (I.J. at 7). The respondent did not establish that his conviction under 18 Pa. Const. Stat. § 6117(a) for altering/obliterating a mark of identification on a firearm, was not for an aggravated felony (Respondent’s Appeal Br. at 14).

The respondent asserts that the Immigration Judge erred in finding that the DHS established that he had been convicted of an aggravated felony (Respondent’s Appeal Br. at 16). However, once the Immigration Judge found that the aggravated felony mandatory ground for denial of cancellation of removal applied to the respondent’s situation, the burden shifted to the respondent to establish by a preponderance of the evidence that the aggravated felony mandatory ground did not apply. *See Matter of U. Singh*, 25 I&N Dec. 670, 671 n.2 (BIA 2012) (noting that

² According to 18 Pa. Const. Stat. § 6118(c), the term “antique firearm” means: “(1) Any firearm with a matchlock, flintlock or percussion cap type of ignition system. (2) Any firearm manufactured on or before 1898. (3) Any replica of any firearm described in paragraph (2) if such replica: (i) is not designed or redesigned for using rimfire or conventional center fire fixed ammunition; or (ii) uses rimfire or conventional center fire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.”

it is the non-citizen's burden to establish his eligibility for cancellation of removal); sections 240A(a)(2)-(3), (d)(1) of the Act; 8 C.F.R. § 1240.8(d) ("If the evidence indicates that one or more of the grounds for mandatory denial of the application for [discretionary] relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.").

We agree with the Immigration Judge's determination that the respondent's guilty plea to altering/obliterating a mark of identification on a firearm in violation of 18 Pa. Const. Stat. § 6117(a), was categorically for an aggravated felony under section 101(a)(43)(E)(iii) of the Act, 8 U.S.C. § 1101(a)(43)(E)(iii), which rendered him ineligible for cancellation of removal (I.J. at 3-4, 6-7; Exh. 2, Tabs B-C).³ Section 240A(a)(3) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

The respondent's contention that 18 Pa. Const. Stat. § 6117(a) is overbroad is unavailing (Respondent's Appeal Br. at 16-21).⁴ According to 18 Pa. Const. Stat. § 6117(a), it is a violation to change, alter, remove, or obliterate the manufacturer's number integral to the frame or receiver of any firearm. Under section 101(a)(43)(E)(iii) of the Act, an aggravated felony is an offense described in 26 U.S.C. § 5861 of the Internal Revenue Code, relating to firearms offenses. Subsection (g) of that statute prohibits the obliteration, removal, change, or alteration of the serial number or other identification of a firearm. 26 U.S.C. § 5861(g). We note that 26 U.S.C. § 5861(g), like 18 Pa. Const. Stat. § 6117(a), does not contain an exception for antique firearms. Therefore, 18 Pa. Const. Stat. § 6117(a), is not overbroad. The case the respondent cites on appeal, *Commonwealth v. Berta*, 514 A.2d 921 (Pa.Super. 1986) is irrelevant to the analysis of whether his conviction under 18 Pa. Const. Stat. § 6117(a) is categorically for an aggravated felony as that case concerns a different section of Pennsylvania's Uniform Firearms Act.

Given that the respondent's conviction under 18 Pa. Const. Stat. § 6117(a) is categorically for an aggravated felony as defined under section 101(a)(43)(E)(iii) of the Act, and the respondent did not establish by a preponderance of the evidence that the aggravated felony mandatory denial ground did not apply to his situation, he has not established that he is eligible for cancellation of removal (I.J. at 3-4, 6-7; Exh. 2, Tabs B-C). Sections 101(a)(43)(E)(iii) and 240A(a)(3) of the Act; 8 C.F.R. § 1240.8(d).

Although the respondent argues on appeal that the DHS should be bound by its concession that he was eligible for cancellation of removal, the record does not establish that the DHS made such a concession (Respondent's Appeal Br. at 14; Tr. at 14, 60). The DHS attorney's cursory

³ Pursuant to 18 Pa. Const. Stat. § 6117(a), "[n]o person shall change, alter, remove, or obliterate the manufacturer's number integral to the frame or receiver of any firearm which shall have the same meaning as provided in section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms)." "A violation of this section constitutes a felony of the second degree." 18 Pa. Const. Stat. § 6117(c).

⁴ The respondent concedes that 18 Pa. Const. Stat. § 6117(a) is indivisible (I.J. at 6 ns. 5-6; Respondent's Appeal Br. at 17).

acknowledgement regarding the respondent's decision to apply for cancellation of removal was not a concession that the respondent was eligible for such relief (Tr. at 14). Further, even if the DHS attorney's remarks can be construed as a concession, the government cannot be bound by such a concession when an alien cannot meet the statutory requirements for the relief sought.

Insofar as the respondent argues on appeal that he was deprived of his right to due process because the Immigration Judge failed to conduct meaningful analysis of the issues in this case, he has not demonstrated substantial prejudice (Respondent's Appeal Br. at 22). *Matter of G-*, 20 I&N Dec. 764, 780-81 (BIA 1993); *Matter of Exame*, 18 I&N Dec. 303, 306-07 (BIA 1982). The record reflects that the Immigration Judge applied the proper legal standards and carefully analyzed the facts. Under the circumstances of this case, the respondent has not demonstrated substantial prejudice to establish a due process violation. *Matter of G-*, *supra*; *Matter of Exame*, *supra*.

The respondent seeks to have his proceedings reopened and remanded based on an assertion that the case, *Commonwealth v. Berta*, *supra*, constitutes new previously unavailable material evidence showing that there was a reasonable possibility that someone could be prosecuted in Pennsylvania for carrying an antique firearm without a license. However, that case was decided prior to the commencement of the respondent's proceedings and it does not constitute new previously unavailable material evidence that warrants reopening of his proceedings. *INS v. Doherty*, 502 U.S. 314, 315 (1992) ("[M]otions to reopen shall not be granted unless it appears that evidence sought to be offered is material, was not available, and could not have been discovered or presented at the former hearing."); 8 C.F.R. § 1003.2(c).

In addition, the Board may deny a motion to reopen where a remand would not alter the outcome of the case. See *INS v. Doherty*, *supra*, at 323 (holding a motion to reopen may be denied where the movant would not be entitled to the discretionary grant of relief which he sought). Here, even if *Commonwealth v. Berta*, *supra*, constitutes new previously unavailable material evidence showing that there is a reasonable possibility that someone could be prosecuted in Pennsylvania for carrying an antique firearm without a license pursuant to 18 Pa. Const. Stat. § 6106(a)(1), the Immigration Judge could conclude in the alternative that the respondent is removable and ineligible for cancellation of removal based on his second guilty plea for altering/obliterating a mark of identification on a firearm in violation of 18 Pa. Const. Stat. § 6117(a).

Finally, we decline to reopen the respondent's proceedings as a matter of discretion. See *INS v. Doherty*, *supra* ("[T]he granting of a motion to reopen is discretionary."); 8 C.F.R. § 1003.2(a). The respondent has an extensive criminal history in New York, in addition to the two felonies in Pennsylvania (see attachments to the respondent's application for cancellation of removal). Although the Immigration Judge did not address whether the respondent warranted cancellation of removal as a matter of discretion, it is unlikely he would warrant a discretionary grant of relief, even if he were statutorily eligible for cancellation of removal. See, e.g., *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978) (discussing favorable and non-favorable factors to be weighed in adjudicating a waiver of inadmissibility); *Matter of Buscemi*, 19 I&N Dec. 628, 633-34 (BIA 1988) (holding that "unusual or outstanding equities must be

demonstrated because of either a single serious crime or because of a succession of criminal acts).

Based on the foregoing, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to reopen is denied.

A handwritten signature in black ink, appearing to read "C. M. G. S.", is written over a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Antonio, TX

Date: MAR – 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Benjamin R. Winograd, Esquire

ON BEHALF OF DHS: Todd J. Keller
Assistant Chief Counsel

APPLICATION: Reconsideration

The respondent has filed a timely motion requesting the Board reconsider our decision of December 28, 2015, in which we affirmed the Immigration Judge's discretionary denial of the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security has opposed the motion. The motion to reconsider will be denied.

A motion to reconsider must identify a material error of fact or law in the decision for which reconsideration is being requested. 8 C.F.R. § 1003.2(b)(1). The respondent argues that the Board neglected to consider him credible on appeal, improperly drew a negative inference from the lack of testimony from his wife and daughter, and overlooked his equities.

We are not persuaded of any material error in the Board's prior decision. We note that the Board adopted and affirmed the Immigration Judge's decision, which appropriately addressed the relevant equities. The Board opted "only" to "write separately" regarding the lack of supporting testimony or documentation from the respondent's wife and daughter (Board's Decision at 1). In so doing the Board did not treat the respondent as lacking in credibility; rather, the Board was noting that the respondent's testimony alone, in the absence of any supporting evidence from the wife and daughter and absent a reasonable explanation for the lack of such evidence, was insufficient to meet the respondent's burden. We conclude that the Board's decision was without material error.

The respondent also suggests that the Board Member who signed the decision on appeal may be "less inclined to favorably exercise discretion" and suggests reconsideration may be warranted on that basis, specifically citing other cases in which that Board Member dissented (Motion at 18-19). Differences of opinion between jurists in unrelated cases do not demonstrate any error in the Board's prior decision. Moreover, the negative factors in the respondent's case, as set forth clearly in the Immigration Judge's decision, were substantial.

ORDER: The motion to reconsider is denied.

A handwritten signature in black ink, appearing to be "J. B. Smith", written over a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Lumpkin, GA

Date: OCT - 5 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening; reconsideration

The Board entered the final administrative order of removal in this case on July 22, 2015, when we dismissed the respondent's appeal from the Immigration Judge's March 12, 2015, decision denying his applications for relief from removal. On September 1, 2015, the respondent filed the instant motion with the Board, followed on September 18, 2015, by a supplemental statement and additional evidence. By its content, the motion is in the nature of a motion to reopen and reconsider.¹ See *Matter of Cerna*, 20 I&N Dec. 399, 402 n.2 (BIA 1991) (discussing the characteristics of motions to reopen and motions to reconsider); sections 240(c)(6), (7) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(6), (7); 8 C.F.R. §§ 1003.2(b), (c). The motion will be denied.

The respondent, who was found removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), now contests his removability. The respondent, however, did not contest his removability on appeal. Therefore, the issue of the respondent's removability is deemed waived. See *Matter of Edwards*, 20 I&N Dec. 191, 196, n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived on appeal). Further, a motion to reconsider is not an opportunity for a second effort at proving allegations or to raise arguments that could have been raised earlier in the proceedings. See *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). We will not consider the issue of the respondent's removability further at this time.

To the extent that the respondent now seeks to offer additional evidence with this motion, specifically evidence pertaining to his character and the hardship that might result due to his removal, the respondent has not explained why such evidence was not offered at the time of his removal hearing. Under the circumstances, reopening on the basis of such evidence is not warranted. See section 240(c)(7)(B) of the Act; 8 C.F.R. § 1003.2(c)(1).

Accordingly, the respondent's motion to reopen and reconsider will be denied.

¹ To accommodate a recent change to the Board's address, the instant motion is deemed timely filed.

The following order will be entered.

ORDER: The motion to reopen and reconsider is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date: FEB 12 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ORDER:

On February 23, 2010, the Immigration Judge determined that the respondent is an aggravated felon, and also is not a citizen of the United States, but is a native and citizen of Haiti. We dismissed the respondent's appeal as untimely on January 4, 2013, and denied a motion to reopen for lack of jurisdiction on September 17, 2015. A motion to reopen was filed on January 12, 2016, to which the Department of Homeland Security (DHS) has not responded. The respondent again asserts that he derived citizenship from his adoptive United States citizen father. As we stated previously in this case, we do not normally have jurisdiction over motions filed in cases where we never assumed initial jurisdiction. *See Matter of Lopez*, 22 I&N Dec. 18 (BIA 1998); *Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974). "Where the Board dismisses an appeal solely for lack of jurisdiction, without adjudication on the merits, the appeal is deemed nugatory, and the Immigration Judge retains jurisdiction over any subsequent motion to reopen or reconsider." *Matter of Lopez, supra*, at 17. *See also Matter of Armendarez*, 24 I&N Dec. 646, 652 (BIA 2008). In this case, as we held in our previous order in this case, we lack jurisdiction over the pending motion because the appeal was dismissed as untimely. We note, moreover, that the Immigration Judge has considered the respondent's current assertions, both in his final order, and in denying four motions to reopen, but found that the respondent's claim to derivative citizenship lacks merit. The motion to reopen is, therefore, denied for lack of jurisdiction.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

NOV 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul Grotas, Esquire¹

ON BEHALF OF DHS: Cynthia Gordon
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on September 4, 2008, when we affirmed the Immigration Judge's decision denying the respondent's motion to reopen and rescind an in absentia order of removal. On October 5, 2015, the respondent filed another motion to reopen. The Department of Homeland Security has opposed the motion. The motion will be denied.

In the motion, the respondent argues that his proceedings should be reopened and the in absentia order of removal should be rescinded because he did not receive the notice of his May 23, 2003, hearing (Motion, at 1-3). The respondent also argues that he (b) (6) in Dominican Republic (b) (6) (Motion, at 3-5). However, counsel's statement in a motion or brief is not evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The respondent's motion is not supported by any affidavit or evidentiary material, as required for a motion to reopen. 8 C.F.R. § 1003.2(c)(1).

Furthermore, the respondent's motion to reopen is a second motion to reopen to rescind an in absentia order of removal. A motion to reopen and rescind an in absentia order of removal may be filed at any time, without subject to time limitations, if the alien demonstrates that he or she did not receive notice of hearing. 8 C.F.R. § 1003.23(b)(4)(ii). However, an alien may file only one motion to reopen to rescind an in absentia order. *Id.* In the respondent's case, the respondent had filed a motion to reopen to rescind the in absentia order of removal with the Immigration Judge, on or about August 31, 2007. Therefore, his current motion will be denied as number-barred. *Id.*; *Matter of Oparah*, 23 I&N Dec. 1 (BIA 2000); *Matter of L-V-K*, 22 I&N Dec. 976 (BIA 1999). Furthermore, in the prior motion to reopen, the respondent did not deny

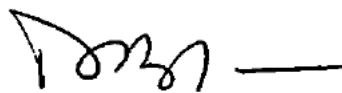
¹ The respondent's motion was submitted by attorney Guido Moreira, but this attorney did not submit a Notice of Entry of Appearance (Form EOIR-27). However, attorney Paul Grotas, of the same legal practice and business address, submitted a Notice of Entry of Appearance.

that he received a notice of hearing, although he argued that he did not attend his May 23, 2003, hearing due to exceptional circumstances. In the September 17, 2007, decision denying the prior motion to reopen, the Immigration Judge found that the respondent received proper notice of his hearing (I.J. at 2).

The respondent also argues that he (b) (6) in Dominican Republic based (b) (6) (Motion, at 3-5). As noted above, the motion is not supported by evidentiary materials regarding his (b) (6). Furthermore, although the respondent argues that (b) (6) in Dominican Republic, he has not argued or shown that such (b) (6), such that his motion falls within the exception to the time and number limitations for motions to reopen to apply or reapply for (b) (6) or (b) (6) in the country of nationality. Section (b) (6). Accordingly, the motion to reopen will be denied.

The respondent also argues that the Immigration Judge erred by failing to apply safeguards regarding (b) (6). To the extent the respondent claims an error in the Immigration Judge's decision or the Board's decision affirming the Immigration Judge's decision, such arguments should have been raised on appeal or in a timely motion to reconsider. Furthermore, the Immigration Judge's March 23, 2003, decision indicates that the respondent was represented by counsel at the time. Based on the above, the respondent's motion will be denied.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Oakdale, LA

Date:

FEB 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sean Lewis, Esquire

ON BEHALF OF DHS: James F. Polivka
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude

APPLICATION: Reopening

The respondent, a native and citizen of Yemen, appeals from the Immigration Judge's September 23, 2014, decision denying his motion to reopen. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

This matter was last before us on June 9, 2014, when we summarily dismissed the respondent's appeal from the Immigration Judge's May 17, 2013, decision granting the respondent's application for (b) (6) pursuant to section (b) (6) of the Immigration and Nationality Act, (b) (6). At that time, we remanded the record to allow the DHS to conduct the necessary background checks. On July 14, 2014, the Immigration Judge issued a new decision ordering the respondent removed from the United States and granting his application for (b) (6). On August 11, 2014, the respondent filed a motion to reopen with the Immigration Judge, which the Immigration Judge denied on September 23, 2014.

The respondent seeks reopening based on a claim that his former counsel provided ineffective assistance by failing to submit a brief in support of his original appeal before the Board, which resulted in a summary dismissal of that appeal. He argues that his former counsel's ineffective assistance prevented him from challenging his removability before the

Board and prevented him from seeking cancellation of removal pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The Immigration Judge found that the respondent complied with all of the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), but concluded that the respondent did not show that he was prejudiced by his former counsel's actions because he did not establish that the arguments in his appellate brief would have been successful.

The Immigration Judge's decision will be affirmed. We agree that respondent has not demonstrated that he was prejudiced by his former counsel's failure to file a brief. Specifically, the respondent has not established a reasonable probability that he would have succeeded in challenging the Immigration Judge's determination that he is removable pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony, or that he would have been granted cancellation of removal. *See U.S. v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005) (noting that in order to prove prejudice, an applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

It is undisputed that the respondent was convicted of theft of property in violation of section 39-14-103 of the Tennessee Code. In assessing whether a state criminal conviction is for an aggravated felony, we look not to the facts of the particular case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013). The term "aggravated felony" includes a theft offense (included receipt of stolen property) or burglary offense for which the term of imprisonment is at least 1 year. Section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). The generic definition of "theft offense" is a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. *Burke v. Mukasey*, 509 F.3d 695, 697 (5th Cir. 2007). A person violates section 39-14-103 of the Tennessee Code, if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent. Because the elements of the state statute correspond to the generic theft offense definition, we agree with the Immigration Judge that an offense under that statute is categorically a theft offense within the meaning of section 101(a)(43)(G) of the Act.

We are not persuaded by the respondent's assertion that section 39-14-103 of the Tennessee Code is not categorically a theft offense because it is a "hybrid" theft-fraud offense that can also be committed fraudulently (Respondent's Br. at 3-5). We acknowledge, as explained by the Tennessee Supreme Court, that the state legislature "eliminated the antiquated and confusing distinctions among various larceny-related crimes by opting for a single theft of property statute that embodies separate theft-related offenses." *State v. Byrd*, 968 S.W.2d 290, 291-92 (Tenn.1998); *see also* TENN. CODE § 39-14-101 (stating that the current theft statute "embraces...embezzlement, false pretense, fraudulent conversion, larceny, receiving/concealing stolen property, and other similar offenses."). However, fraud is not an element of section 39-14-103 of the Tennessee Code and the respondent has not shown a realistic probability that an individual would be convicted under that statute for conduct that falls outside of the generic theft offense definition. *See State v. Byrd, supra*, at 292 (stating that "theft of property may be

accomplished in one of two manners: (1) taking or obtaining property without consent and with an intent to deprive; or (2) exercising control over property without consent and with the intent to deprive.); *see also Moncrieffe v. Holder, supra*, at 1684-85 (stating that there must be a realistic probability, not a theoretical possibility, that a state would apply its statute to conduct that falls outside the generic definition of a crime).

We are also not persuaded by the respondent's assertion that his conviction does not constitute an aggravated felony within the meaning of section 101(a)(43)(G) of the Act because he was ordered to serve 10 days in jail (Respondent's Br. at 6-7). The Immigration Judge's finding that the respondent was sentenced to 3 years in CCA with an alternative sentence of 3 years of probation is not clearly erroneous (I.J. at 3, Sept. 23, 2014). Although the respondent's CCA sentence was ultimately suspended and he was only required to serve 10 days in jail before being released on probation, we agree with the Immigration Judge that the 3 year suspended sentence satisfies the 1 year imprisonment requirement under section 101(a)(43)(G) (I.J. at 3-4, Sept. 23, 2014). The respondent has offered no support for his claim that the sentence imposed was only 10 days because the trial court suspended imposition of the 3 year sentence. On the contrary, the Act clearly and unambiguously provides that any reference to a term of imprisonment includes any period of incarceration ordered, "regardless of any suspension of imposition or execution of that imprisonment or sentence in whole or in part." Section 101(a)(48)(B) of the Act.

Because the respondent has been convicted of an aggravated felony, he is removable pursuant to section 237(a)(2)(A)(i) of the Act, and he has not shown a reasonable probability that, but for his former counsel's failure to file an appellate brief, these proceedings would have been terminated. Likewise, he has not shown a reasonable probability that, but for his former counsel's failure to file brief, he would have been granted cancellation of removal. *See* section 240A(a)(3) of the Act (stating that cancellation of removal is unavailable to an alien who has been convicted of an aggravated felony). Consequently, he has not demonstrated that he was prejudiced by his former counsel's actions, and the Immigration Judge properly denied his motion to reopen.¹

In light of the foregoing, the respondent's appeal will be dismissed. The following order will be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

¹ Because the respondent has not established that he was prejudiced by his former counsel's actions, we do not reach his arguments concerning whether he has been convicted of two or more crimes involving moral turpitude (Respondent's Br. at 7-9).

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date: FEB 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tiffany Javier, Esquire

ON BEHALF OF DHS: Sarah B. Campbell
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined in sections 101(a)(43)(B), (U))
(sustained)

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation (sustained)

APPLICATION: Termination of proceedings

This case was last before the Board on January 21, 2010, when we remanded the record to the Immigration Judge for further proceedings and for the entry of a new decision. In a decision dated July 24, 2014, the Immigration Judge found the respondent removable as charged, and denied his motion to terminate proceedings based on his claim of being a United States citizen. The respondent's appeal of that decision will be dismissed.¹

The respondent is a native of the Dominican Republic who was admitted to the United States as a lawful permanent resident on April 8, 1996 (I.J. at 1; Exhs. 1, R6). On (b) (6) 1997, he was convicted of attempted criminal sale of a controlled substance in the third degree in violation of sections 110 and 220.39 of the New York Penal Law (I.J. at 1; Exhs. 2, R7). These removal proceedings were initiated by the Department of Homeland Security ("DHS") with the service of a Notice to Appear ("NTA") on May 11, 2007, charging the respondent with removability based on this conviction (I.J. at 1-2; Exhs. 1, 2, R7).

The respondent filed a motion to terminate on August 14, 2007, based on his claim that he derived United States citizenship from his mother's naturalization on April 2, 1993 (I.J. at 2;

¹ The respondent does not challenge the Immigration Judge's findings of removability based on his criminal conviction.

Exh. R3). In a December 3, 2007, decision, the Immigration Judge found the respondent removable as charged and denied his motion to terminate (I.J. at 2). The respondent appealed from this decision, and the Board remanded the record to the Immigration Judge for further proceedings on February 29, 2008 (I.J. at 2). The Immigration Judge again denied the motion to terminate on September 2, 2009, and the respondent appealed from the decision (I.J. at 2). The DHS filed a motion to remand on December 14, 2009, which was granted by the Board on January 21, 2010 (I.J. at 2). On July 24, 2014, the Immigration Judge denied the respondent's motion to terminate, and ordered him removed to the Dominican Republic (I.J. at 2).

We review findings of fact, including determinations as to credibility and the likelihood of future events, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues under a de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001) (citing *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977)); *Matter of Tijerina-Villareal*, 13 I&N Dec. 327, 330 (BIA 1969). The respondent does not dispute that he was born in the Dominican Republic, and therefore bears the burden of presenting evidence in support of his United States citizenship. *Matter of A-M-*, 7 I&N Dec. 332 (BIA 1956) (finding that one born abroad is prima facie an alien).

The respondent maintains that he acquired citizenship through his mother by operation of former section 321(a)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1432(a)(3), and that the Immigration Court therefore lacked jurisdiction to order his removal (I.J. at 4-6; Exh. R3; Respondent's Brief at 5-10).² Former section 321(a)(3) of the Act provided in pertinent part that a child born outside the United States of alien parents automatically became a citizen of the United States upon the naturalization of the parent having legal custody of the child when there had been a legal separation of the parents, provided that both the custodial parent's naturalization and the child's admission to lawful permanent residence occurred prior to the child's 18th birthday. *See Matter of Baires*, 24 I&N Dec. 467 (BIA 2008). A "legal separation" for purposes of derivative citizenship "requires a formal act which, under the laws of the state or nation having jurisdiction of the marriage, alters the marital relationship either by terminating the marriage (as by divorce), or by mandating or recognizing the separate existence of the marital parties." *Brissett v. Ashcroft*, 363 F.3d 130, 134 (2d Cir. 2004); *see also Lewis v. Gonzales*, 481 F.3d 125, 131 (2d Cir. 2007) (holding that a "formal, legal act" is required to establish a "legal separation" under former section 321(a)(3) of the Act). A legal separation may also include "some orders that the relevant state or nation might not characterize as creating a legal separation

² Current section 320 of the Act, 8 U.S.C. § 1431, does not apply to the respondent because he was not under 18 years old on February 27, 2001, the effective date of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631. *Matter of Rodriguez-Tejedor*, *supra*.

[but] nonetheless effect such a drastic change in the couple's existence that the couple may be considered legally separated." *Id.*

It is undisputed that the respondent was under the age of 18 when his mother naturalized, and that he was residing in the United States as a lawful permanent resident while under the age of 18 (I.J. at 7; Exhs. R3, R6). Therefore, the dispositive question on appeal is whether the respondent has established that he was in his mother's "legal custody" pursuant to a "legal separation" while under the age of 18 (I.J. at 7).

The respondent's parents married in the Dominican Republic in 1973, were legally divorced in 1981, and remarried each other in 1983 (I.J. at 8; Exhs. R3, R12). The couple returned to the Dominican Republic and signed a separation agreement that was drafted by their attorney on (b) (6), 1991, but the agreement was never filed with a court of competent jurisdiction (I.J. at 8; Exh. R3). The respondent maintains on appeal that the (b) (6) 1991 separation agreement was a formal action altering his parents' marital relationship, and created a "legal separation" despite the fact that it was never ratified in court (Respondent's Brief at 4-10). The respondent has submitted no evidence to establish that the mere signing of a separation agreement by his parents constituted a formal, legal act that altered their marital relationship under the laws of New York or the Dominican Republic. See *Brissett v. Ashcroft*, *supra*, at 134; *Lewis v. Gonzales*, *supra*, at 131. To the contrary, an Administrative Civil Sentence from a court in the Dominican Republic, dated (b) (6) 2009, notes that the respondent's parents were separated "in fact," but concluded that their separation was not legally valid under Dominican law because a judicial separation can only "be offered by means of decision of the competent [c]ourt" (I.J. at 9; Exh. R12 at 3). The Immigration Judge was correct in refusing to recognize the nunc pro tunc order by the Dominican court retroactively ratifying the separation agreement, because it was issued for the express purpose of impacting the outcome of these proceedings (I.J. at 9; Exh. 12 at 10; Respondent's Brief at 12-17). See *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 401 (5th Cir. 2006); *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000).

The Immigration Judge noted that the respondent provided conflicting statements regarding his parents' separation and the nature of their relationship between May 1991 and his father's death in December 2004 (I.J. at 8). While the respondent maintained that his mother traveled to the Dominican Republic in May 1991 to enter into a separation agreement with his father, his mother's Application for Naturalization (Form N-400) indicates that she traveled to the Dominican Republic due to her father-in-law's death (I.J. at 8; Exhs. RB, RR2; Tr. at 86-87). The respondent's mother testified that she did not discover that her husband was in the Dominican Republic until 2 or 3 days after her arrival, which is inconsistent with statements in her affidavit indicating that she knew her husband was in the Dominican Republic because his father had a stroke (I.J. at 8; Exh. RR3; Tr. at 48, 87-91, 98-103). Moreover, the respondent's mother provided conflicting statements regarding whether she or her husband initiated the separation agreement (I.J. at 8; Exh. R3; Tr. at 83-86, 92-93). While the respondent's mother and sister both testified that his father did not live with their family between 1990 and 2004, a Form N-400 signed by the respondent's mother on April 30, 1992, indicates that she was married to the respondent's father and they lived at the same address (I.J. at 8; Exh. RR2; Tr. at 54-57, 63-67, 71-73, 93-97, 103-08, 123, 145-49). Finally, the respondent's father's death certificate notes that he was married to the respondent's mother and lived with her at the time of his death,

and lists her as the informant (I.J. at 8; Exh. R3; Tr. at 59-62, 75-79, 125-34, 151-58). The Immigration Judge's adverse credibility finding is not clearly erroneous (I.J. at 8). See 8 C.F.R. § 1003.1(d)(3); see also *Xiu Xia Lin v. Mukasey*, 534 F.3d 162 (2d Cir. 2008).

The respondent has submitted no evidence to establish that his parents were legally separated under Dominican law or the law of New York on (b) (6), 1991, or any time prior to his 18th birthday. There is no clear error in the Immigration Judge's determination that the respondent's parents lived together in the United States as husband and wife until his father's death on (b) (6), 2004 (I.J. at 8; Exhs. R3, RR2). Contrary to the respondent's assertions on appeal, the Immigration Judge was not required to reach the question whether his mother had legal custody of him at the time of her naturalization, because he had not established that his parents were legally separated (I.J. at 9; Respondent's Brief at 10-12). See *Lewis v. Gonzales*, *supra*, at 130 (finding legal custody insufficient to support a derivative citizenship claim in the absence of legal separation).

Based on the foregoing, we find that the respondent has not shown that his parents were legally separated prior to his 18th birthday. The requirement of a formal marital separation is essential to demonstrating derivative citizenship under former section 321(a)(3). See *Brissett v. Ashcroft*, *supra*, at 133-34 (requiring formal marital separation); *Matter of H-*, 3 I&N Dec. 742, 744 (C.O. 1949) (same). Consequently, the respondent is unable to establish eligibility for derivative citizenship under former section 321(a)(3) of the Act. Therefore, we agree with the Immigration Judge's conclusion that the respondent did not meet his burden of proof to establish his derivative citizenship claim. See *Matter of A-S-B-*, *supra*; *Matter of Rodriguez-Tejedor*, *supra*.³

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.


FOR THE BOARD

³ Furthermore, we note that any doubt should be resolved against the person seeking to be declared a citizen. *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 637 (1967).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Lumpkin, GA

Date: FEB 29 2016

In re: (b) (6)

IN (b) (6) PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Pro se

ORDER:

On December 14, 2015, we dismissed the applicant's appeal for lack of jurisdiction. That is, the applicant appealed an Immigration Judge's order dated November 2, 2015. The applicant was referred to the Immigration Judge for a review of the adverse (b) (6) made by the Department of Homeland Security (DHS). The Immigration Judge affirmed the decision of the (b) (6), and returned the case to the DHS for removal of the applicant. We observed that no appeal lies from an Immigration Judge's decision reviewing a negative (b) (6). (b) (6) The applicant has now filed a motion, which alternatively seeks reconsideration or reopening of our prior order. The DHS has not responded to the motion. The applicant's filing does not establish any error in our previous decision, so we decline to reconsider the December 14, 2015, decision. Moreover, as we lack jurisdiction over an appeal in (b) (6) proceedings, we find that we also lack authority to consider a motion to reopen in such proceedings. The motion is, therefore, denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date: APR - 5 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Kerry E. Doyle, Esquire

APPLICATION: Reopening

This case is before the Board pursuant to a November 23, 2015, order of the United States Court of Appeals for the First Circuit granting the government's motion to remand. The government moved for remand to the Board to allow us to further consider whether the respondent's proceedings should be reopened pursuant to his motion to reopen alleging ineffective assistance of former counsel. The First Circuit vacated our March 11, 2015, decision. The record will be remanded.

In our March 27, 2014, decision we dismissed the respondent's appeal from the Immigration Judge's decision which found him removable and denied his application for cancellation of removal for certain permanent residents. We denied his untimely motion to reopen proceedings in our now vacated March 11, 2015, decision.

We had previously concluded that the respondent met the requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), to properly allege ineffective assistance of former counsel. We now conclude that the respondent shows prejudice. See *Muyubisnay-Cungachi v. Holder*, 734 F.3d 66, 72 (1st Cir. 2013) (an alien making an ineffective assistance claim must establish both a deficient performance by counsel and a reasonable probability of prejudice resulting from his or her former representation).

The respondent submits supplemental evidence that was not previously available. Certain documents from the Massachusetts Board of Bar Overseers ("BBO") were not sent to the respondent previously, but have now been obtained by counsel. These documents include attachments to former counsel's reply to the allegations against him. Given the new evidence presented, and the remand from the First Circuit, we find that there has been an adequate showing of prejudice.

We did not address due diligence in our March 11, 2015, decision, but we will do so now, and we conclude that the respondent shows due diligence. See *Meng Hua Wan v. Holder*, 776 F.3d 52, 58 (1st Cir. 2015) (equitable tolling is unavailable to excuse a party who has failed to exercise due diligence; the Board's decision specifically noted that the 11-year delay in filing a motion to reopen precluded a finding of due diligence even if the alien had received the parlous legal advice that he claimed to have gotten). The Board dismissed the respondent's appeal on March 27, 2014. The respondent obtained present counsel, executed his sworn declaration, filed a complaint against former counsel with the BBO, and filed his motion to reopen on November 7,

2014. He also filed a petition for review. In sum, the respondent meets the requirements in *Matter of Lozada, supra*, shows prejudice, and shows due diligence. Equitable tolling of the time limitation on his motion to reopen is warranted.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings in accordance with the foregoing opinion, and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) – Lumpkin, GA

Date: FEB 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

This case was last before us on April 24, 2015, when we dismissed the respondent's appeal from an Immigration Judge's December 11, 2014, decision denying his applications for cancellation of removal for certain permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and waivers of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c), and section 212(h) of the Act. The respondent filed a motion to reopen on November 16, 2015, arguing that new evidence regarding his mental health would change the outcome of his proceeding. The respondent's motion will be denied.

In additional filings subsequent to the filing of his motion to reopen, the respondent argues that the criminal conviction underlying his aggravated felony crime of violence charge of removability was overturned by a state court of appeals, and that these proceedings should be terminated because his equal protection rights have been violated.

The respondent's motion is untimely. The final administrative order in this case was issued on April 24, 2015. With certain exceptions not pertinent here, a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. *See* section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The present motion was filed on November 16, 2015, beyond the 90-day deadline.

Further, the respondent has not submitted new, previously unavailable, and material evidence in support of his motion to reopen. *See* 8 C.F.R. § 1003.2(c)(1) (providing that "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not be available and could not have been discovered or presented at the former hearing"). The respondent claims to offer new evidence regarding his mental health, but the document he submitted is a copy of the Immigration Judge's April 4, 2014, mental competency evaluation. We reviewed this evaluation in our prior decision and found no clear error in the Immigration Judge's competency determination.

The respondent also alleges that the criminal conviction underlying his aggravated felony charge of removability was "dismissed" by the state court on (b) (6), 2015. We took administrative notice in our prior decision that the Court of Appeals for the State of Georgia dismissed the respondent's appeal on March 20, 2015, noting that it had affirmed the

respondent's judgment of conviction in an unpublished opinion, *see* (b) (6) (decided (b) (6), 2010), and that the respondent is estopped from seeking further judicial review on the issues he raised. The respondent has not established that his conviction has been modified or overturned, as might justify reopening. *See Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996) (stating that collateral attacks upon an alien's conviction do not operate to negate the finality of the conviction unless and until it is overturned); *Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1988) (explain that a party who seeks a remand or to reopen proceedings to pursue relief bears a "heavy burden" of proving that if proceedings were reopened, the new evidence would likely change the result in the case).

Next, the respondent appears to argue that his equal protection rights were violated and his proceedings should be terminated because, in his view, cases similar to his have been decided differently by the Board. But unpublished Board decisions carry no precedential value and, further, none of the decisions the respondent relies upon address whether the criminal statute he was convicted of (criminal damage in the second degree in violation of Georgia Code Annotated § 16-7-23(a)(1)) is a crime of violence under 18 U.S.C. § 16(b), as we concluded in our prior decision. The respondent also has not shown that these unpublished decisions, which date from 2000 to 2010, are new and previously unavailable. We are not persuaded by the respondent's reliance on *United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) for the reasons already explained in our prior decision. To the extent the respondent's arguments in this regard can be construed as a motion to reconsider our prior decision, the motion is denied as the respondent has not identified a material error of fact or law in our prior decision and the motion is untimely. *See* 8 C.F.R. § 1003.2(b)(1) (providing that a motion to reconsider shall specify the errors of fact or law in the prior Board decision and must be filed with the Board within 30 days after the mailing of the Board decision); *see also Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006).

Lastly, the respondent has not demonstrated exceptional circumstances warranting sua sponte reopening. *See* 8 C.F.R. § 1003.2(c)(3); *Matter of J-J-*, 21 I&N Dec. Dec. 976, 984 (BIA 1997). Accordingly, the motion will be denied.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date: APR 22 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se¹

APPLICATION: Reopening

This matter was last before the Board on June 10, 2015, when we dismissed the respondent's appeal from the Immigration Judge's decision pretermittting his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a).² On December 18, 2015, he filed a motion to reopen with this Board alleging ineffective assistance by two former attorneys: Lazar Lowinger, who represented him in conjunction with his proceedings before the Immigration Judge, and Allen Tow, who represented him in conjunction with his Board appeal. The Department of Homeland Security has not filed a response. The motion to reopen will be denied.

The respondent's motion to reopen is untimely. Section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2); June 10, 2015, Board dec. (final administrative decision). However, for purposes of today's decision, we will assume, without squarely deciding, that the 90-day filing deadline of this motion is equitably tolled. See *Omar v. Lynch*, No. 15-1258, 2016 WL 759883, at *2 (1st Cir. Feb. 25, 2016) (citing *Neves v. Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam)). Nevertheless, the respondent's motion will be denied.

The respondent claims he received ineffective assistance by two former attorneys but, admittedly, he has not filed a complaint against either of these attorneys with the appropriate disciplinary authorities, in accordance with the third prong of *Matter of Lozada*, *id.* Motion at 8,

¹ The respondent's motion is signed by attorney Virginia Benzan, who has not filed the requisite Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27). Therefore, the respondent is viewed as appearing pro se in connection with his motion to reopen. We will, however, send a courtesy copy of today's decision to attorney Benzan at: Law Office of Virginia Benzan, P.O. Box 120398, Boston, MA 02112.

² In dismissing the respondent's appeal, we noted that although he alleged ineffective assistance in his removal proceedings (when represented by attorney Lowinger), there was no showing that he had complied with the procedural requirements for presenting such a claim, as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988). We also found that the respondent did not demonstrate that he was prejudiced as a result of former counsel's claimed ineffectiveness.

#30. Moreover, in our view, he has not adequately and persuasively explained why he has not done so.

As to attorney Lowinger, it is explained that efforts to contact him about the respondent's case by letter and phone have proved unsuccessful. Motion at 8, #29. However, current counsel concedes that attorney Lowinger has actually telephoned and left messages for her after she sent him the respondent's "*Lozada*" letter, and therefore it cannot be said that attorney Lowinger has refused to cooperate in this matter.³ Motion at 8, #29. Although communication challenges have been claimed, it has not been persuasively demonstrated why this circumstance precluded the filing of a bar complaint, prior to the filing of the instant motion, based on the respondent's ineffective assistance allegations, about which attorney Lowinger had already been notified at least 6 weeks before. A motion to reopen filed with this Board should be complete upon filing, particularly given that, generally, an alien is limited by statute and regulation to filing only one such motion. Section 240(c)(7)(A) of the Act; 8 C.F.R. § 1003.2(c)(2).

Regarding the filing of a complaint against attorney Tow, apparently the respondent intends to pursue assistance, at some point in the future, from an Office of the Bar Counsel-associated program prior to filing a formal bar complaint. Motion at 8-9, #30. However, no proof has been submitted confirming that the respondent actually initiated such action prior to the filing of his motion to reopen. Again, we note that a motion to reopen should be complete upon filing.

As an additional matter, the respondent's submissions reflect that attorney Tow has in fact replied to the specific allegations of ineffective assistance being made against him and attorney Lowinger. Motion, Tab D at 30-32 (letter dated October 15, 2015, from attorney Tow to current counsel). Attorney Tow explains with particularity why, in his view, neither he nor attorney Lowinger provided representation amounting to ineffective assistance to the respondent in his removal proceedings, given the totality of circumstances presented. The respondent has neither specifically addressed nor rebutted the substance of attorney Tow's response, even though his response is dated two months prior to the filing of the instant motion. Based on the record before us, and given attorney Tow's unchallenged account of events and explanations, we cannot conclude that the requisite showing of prejudice resulting from the ineffective assistance claimed (against either attorney Lowinger, or attorney Tow) has been made.

³ The instant motion also states, without further elaboration, that "a review of attorneys licensed to practice in New York does not identify Attorney Lazar Lowinger." Motion at 5, #13. This explanation is vague, and lacks sufficient detail regarding the nature of, and source upon which, the "review" was based. In any event, no documentary evidence has been provided establishing that attorney Lowinger is not a licensed member of the bar, and/or was not licensed when he represented the respondent during his removal proceedings.

Based on the foregoing considerations, the motion to reopen will be denied. The request for a stay of removal pending adjudication of the respondent's motion to reopen will be denied as moot. Motion at 10.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of removal pending adjudication of the respondent's motion to reopen is denied as moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) San Diego, CA

Date: APR 12 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kevin M. Tracy, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

APPLICATION: Cancellation of removal under section 240A(a)

The respondent appeals the August 29, 2014, decision of the Immigration Judge finding her removable and denying her application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). During the pendency of the appeal and in lieu of an appeal brief, the respondent filed a motion to remand on the basis that she had received ineffective assistance of counsel. The Department of Homeland Security (DHS) has not responded. The motion will be granted, and the record will be remanded for further proceedings.

We review findings of fact under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, judgment or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *see Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

The respondent, a native and citizen of Vietnam, was granted lawful permanent resident status in 1992 (Exh. 1). In (b) (6) 2007 and (b) (6) 2008, the respondent sustained convictions, pursuant to guilty pleas, for violating TEXAS PENAL CODE § 43.02(a), prostitution (I.J. at 2-3; Exh. 1, Exh. 6 at 10). For the first offense,¹ she was sentenced to 180 days' probation and a \$300 fine (I.J. at 2; Exh. 6 at 10). For the second offense, she was sentenced to 2 days' incarceration and a \$2000 fine (I.J. at 2; Exh. 1, Exh. 6 at 10).

¹ The record reflects that for her first offense, the respondent received a deferred adjudication (Exh. 6 at 29-30). Pursuant to section 101(a)(48)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(48)(A), the term "conviction" is defined to include a disposition where adjudication of guilt has been withheld if the alien has entered a plea of guilty or nolo contendere, or admitted sufficient facts to warrant a finding of guilt, and a judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. *See generally Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). Contrary to the respondent's allegation in her Notice of Appeal (NOA), her guilty plea to prostitution remains a conviction for immigration purposes.

On (b) (6), 2013, the respondent sought reentry to the United States at the Los Angeles International Airport and applied for admission as a returning lawful permanent resident (I.J. at 2; Exh. 1; Tr. at 47). Section 101(a)(13)(C)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13)(C)(v), provides that a lawful permanent resident of the United States is to be treated as an applicant for admission (or “arriving alien”) if he or she “has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a).”

Based on the documentary evidence of record and the respondent’s concessions, the Immigration Judge concluded that the respondent is removable (I.J. at 2-3; Tr. at 6, 13). He determined that her convictions constituted convictions involving moral turpitude and that she was not eligible for the “petty offense exception”² (I.J. at 3). The respondent does not dispute her removability. The Immigration Judge denied the respondent’s application for section 240A(a) cancellation of removal as a matter of discretion (I.J. at 5-10).

On appeal, the respondent has moved for remand on the basis that she received ineffective assistance of counsel. Specifically, she states that her prior attorney failed to seek a stand-alone waiver of admissibility under section 212(h) of the Act (Respondent’s Motion at 3).³ The respondent argues that she has substantially complied with the requirements for making such a claim, as described in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). These requirements include filing an affidavit describing the scope of the representation agreement, notifying the prior attorney of the allegations, and lodging a complaint against the attorney with the proper disciplinary authorities (or explaining why this was not done). *Matter of Lozada*, *supra*, at 639.

Here, the respondent has included an affidavit describing the scope of the representation agreement and a copy of the agreement (Attachment to Respondent’s Motion). As evidence that she has notified the prior attorney of the allegations, the respondent has included an affidavit from the prior attorney, conceding that she had little immigration experience at the time she represented the respondent and that she did not diligently research the facts of the case (Attachment to Respondent’s Motion). The respondent explains in her motion that because the prior attorney conceded in her affidavit that she provided ineffective assistance of counsel, she

² The “petty offense” exception, section 212(a)(2)(A)(ii)(II) of the Act, provides that an alien who has committed only one crime is not inadmissible under section 212(a)(2)(A)(i)(I) if (1) the maximum penalty possible for the offense does not exceed 1 year of imprisonment, and (2) the alien was not sentenced to a term of imprisonment in excess of 6 months, regardless of the extent to which the sentence was ultimately executed. To the extent the respondent argues that the petty offense exception applies, her argument is without merit because she has more than one conviction (Respondent’s NOA).

³ A “stand-alone” section 212(h) waiver, such as the one sought by the respondent here, may only be granted to an applicant for admission. *See also Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007) (holding that a returning lawful permanent resident seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with a waiver of inadmissibility under section 212(h) of the Act). The respondent is an applicant for admission.

believed that it would be unnecessary to file a complaint with the State Bar of California (Respondent's Motion at 5). See *Lo v. Ashcroft*, 341 F.3d 934, 938 (9th Cir. 2003) (excusing a petitioner's failure to lodge a complaint with the appropriate state disciplinary authorities where petitioner offered a reasonable excuse for this omission and there was no suggestion of collusion between petitioner and the former counsel). Because the respondent has offered a reasonable explanation and there is no suggestion of collusion between the respondent and the former counsel, we conclude that she has substantially complied with the *Lozada* requirements.⁴

An alien raising an ineffective assistance of counsel claim must establish that she has been diligent in raising the claim and must establish that she was prejudiced by her prior attorney's alleged failures. See *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (requiring exercise of reasonable diligence in pursuing an ineffective assistance of counsel claim). The respondent's timely filing of an appeal with the Board satisfies "reasonable diligence." Regarding prejudice, the respondent appears statutorily eligible for a waiver under section 212(h) of the Act, and on appeal has submitted affidavits from her children indicating that they would suffer extreme hardship upon her removal to Vietnam. Because this application was not before the Immigration Judge, he made no findings regarding whether a qualifying relative of the respondent would suffer extreme hardship upon her removal.⁵ The Board does not consider new evidence presented for the first time on appeal. 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of Haim*, 19 I&N Dec. 641 (BIA 1988); *Matter of Fedorenko*, 19 I&N Dec. 57, 73-74 & n.10 (BIA 1984). Thus, we find it appropriate to remand the record for the Immigration Judge to consider the respondent's eligibility for a waiver of inadmissibility under section 212(h) of the Act. See 8 C.F.R. § 1003.1(d)(3)(iv) (stating that the Board may not engage in fact finding in the course of deciding appeals except for taking administrative notice of commonly known facts); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (in light of Board's limited fact-finding ability on appeal, a remand is appropriate when the record is inadequate for review). Accordingly, the following order will be entered.

⁴ "The filing of a complaint with the attorney's licensing body serves to increase our confidence in the strength of the claim being made. By greatly lessening the chances of collusion and of meritless claims being brought forward for the purposes of delay, the *Lozada* requirements more readily enable us to act on such motions without routinely requiring evidentiary hearings on matters, such as counsel's performance, that are collateral to the merits of substantive immigration law determinations." *Matter of Rivera-Claros*, 21 I&N Dec. 599, 604-05 (BIA 1996) (explaining the value of the bar complaint as a tool evidencing a lack of collusion and preventing future episodes of ineffective assistance of counsel).

⁵ We note that, in denying cancellation of removal in the exercise of discretion, the Immigration Judge did not assess the degree of hardship that the respondent's removal would occasion. Therefore, we do not find that the adverse discretionary determination previously made would necessarily carry over to the section 212(h) waiver context.

ORDER: The respondent's motion to remand is granted, and the record is remanded for further proceedings consistent with the foregoing decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, Massachusetts

Date: JAN 12 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eduardo Masferrer, Esquire

APPLICATION: Reopening

The respondent has filed a timely appeal of an Immigration Judge's August 19, 2015, decision, denying his motion to reopen. The record will be remanded to the Immigration Court for further proceedings consistent with this opinion and the entry of a new decision.

The respondent is a native and citizen of the Dominican Republic who was initially admitted to the United States as an immigrant on March 31, 1992. The respondent was physically removed from the United States on October 2, 2003, pursuant to an Immigration Judge's May 14, 2003, decision ordering his removal on account of his 1997 Massachusetts "drug-trafficking" aggravated felony conviction. On June 25, 2015, the respondent filed a motion to reopen with the Immigration Court alleging that he "is no longer removable as charged [because] the underlying criminal conviction forming the basis of his removability has been vacated . . . due to a substantive and procedural defect in the respondent's plea." In support of the motion, the respondent presented an order from the Boston Municipal Court, dated (b) (6), 2015, issued pursuant to a 2012 remand order from the Massachusetts appellate court, finding the respondent suffered prejudice as a result of former counsel's ineffective assistance in his 1997 criminal proceedings, and granting respondent's request to withdraw his guilty plea and motion for a new trial. The Massachusetts criminal court's action was premised upon what it perceived to be substantive and procedural defects in the underlying criminal proceedings, rather than some form of post-conviction relief. *See Rumierz v. Gonzales*, 456 F.3d 31, 34-35 (1st Cir. 2006) (a vacated conviction is no longer a "conviction" within the meaning of the immigration laws only "if a court with jurisdiction vacates [the] conviction based on a defect in the underlying criminal proceedings."); *see also Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000).

As argued by the respondent on appeal, a conviction vacated on constitutional grounds is void *ab initio*, and therefore cannot be considered valid at the time it was rendered. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006); *see also Commonwealth v. Sylvain*, 466 Mass. 422, 423-24 (2013) (Massachusetts Supreme Judicial Court found that a plea made without counsel's "accurate" advice regarding the immigration consequences of a conviction, when prejudicial, is constitutionally defective). The fact that it took over a decade for the respondent to vindicate his rights does not undermine a finding that enforcement of a removal order that was predicated upon a criminal conviction that was constitutionally defective at the time it was entered, constitutes a gross miscarriage of justice sufficient to warrant reopening the proceedings of a removed alien. *Matter of Malone*, 11 I&N Dec. 730, 731-32 (BIA 1966) (finding gross miscarriage of justice where alien's deportation order was clearly not in accord with the law as interpreted at the time of issuance); *see also Bolieiro v. Holder*, 731 F.3d 32, 37

(b)
(6)

(1st Cir. 2013) (citing *Perez Santana v. Holder*, 731 F. 3d 50, 61 (1st Cir. 2013)) (court found in a case involving an untimely motion to reopen, that the regulations imposing "post-departure bar" on a motion to reopen removal proceedings following an alien's departure cannot be used to preclude a noncitizen alien from vindicating his statutory right to a motion to reopen).

Consequently, we find that reopening of the proceedings is appropriate under the particular circumstances of this case, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and the entry of a new decision. On remand, the Immigration Judge will consider the new evidence offered by the respondent relating to his removability, as charged, and to determine whether the proceedings should now be terminated. Accordingly, the following order will be entered.

ORDER: The motion to reopen is granted and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – York, PA

Date:

MAY - 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: William J. Quirk, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

APPLICATION: Reopening

On March 11, 2016, the respondent submitted his second motion to reopen proceedings in which the Board dismissed his appeal on February 26, 2010. The Department of Homeland Security (DHS) opposes reopening. The Board granted the respondent's stay request on February 24, 2016. The motion will be denied.

The respondent's motion is statutorily time and number-barred as it is his second such motion, and was filed more than 6 years after the Board's final administrative decision. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). However, he seeks reopening as he essentially avers that circumstances in his native Haiti have changed such that he is now eligible for relief. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). We find that the respondent has not met his burden of demonstrating that a (b) (6) has occurred in Haiti such that his motion should be exempted from the noted statutory bars.

As with his prior motion to reopen, the respondent has not submitted a statement in support of his motion. *Matter of B-A-S-*, 22 I&N Dec. 57, 59 (BIA 1998) (noting that assertions made in a motion to reopen should be accompanied by evidentiary support); *see also* section 240(c)(7)(B) of the Act (requiring that a motion to reopen be supported by affidavits or evidentiary material). Statements of counsel in a motion are argument, not evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As with his first motion to reopen, the instant motion contends that the respondent provided information about two individuals from Haiti to agents with the Drug Enforcement Agency after he was arrested in 2011 for a controlled substance violation. One of the individuals, (b) (6), reportedly called the respondent's wife and other unspecified family members, offering to help obtain an attorney, and telling her to remind the respondent to "do what he knows is right and best" (Motion, Tab B). (b) (6) was deported to Haiti before any criminal charges were brought based on the investigation (Motion, Tab A). Thereafter, the respondent's wife received a phone call from an unknown individual who said "we know what [the respondent] done to" (b) (6), and that the respondent (b) (6) when he returned to Haiti (Motion, Tabs A, B). The respondent also provided information about another individual who traveled between the United States and Haiti.

(b) (6)

In essence, the respondent avers that he has (b) (6) should he be deported to Haiti, because of (b) (6) (Motion at 5). He avers that he will be (b) (6) upon his return to Haiti (Motion at 8). He further contends that, as (b) (6), he would (b) (6) (Motion at 5). The respondent asserts that (b) (6) since the 2010 earthquake struck Haiti, (b) (6) in that country (Motion at 3, 5). As such, he contends that (b) (6) (BIA 2002) should be revisited with respect (b) (6) deported Haitians face (Motion at 6-9).

The respondent cites (b) (6) (3d Cir. 2015), as suggesting that revisiting (b) (6), is warranted with respect to its consideration of the Haitian (b) (6) (Motion at 7). However, we note that as this is a nonprecedential decision, it is not binding upon this Board. *Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012); *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (explaining that the Board historically follows a court's precedent in cases arising in that circuit). Similarly, the Board applies the law of the circuit in cases arising in that jurisdiction, and is not bound by a decision of a court of appeals in a different circuit. *Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002). As such, the respondent's reliance on *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012) is misplaced (Motion at 7-9).

Moreover, the respondent bears the burden of establishing that (b) (6) if he is removed to Haiti. (b) (6) " (b) (6) is defined as (b) (6) ."

(b) (6) The Attorney General has also held that a grant of (b) (6) must rely upon a finding that each event in a hypothetical chain of events would be more likely than not to occur. *Matter of J-F-F-*, *supra* at 917. However, we find that the respondent has not submitted objective evidence to support his (b) (6). (b) (6) (A.G. 2006) (holding that (b) (6) claim cannot be granted by stringing together a series of suppositions).

He has not identified any evidence reflecting that (b) (6) or any other individual would (b) (6). We find that the respondent has not demonstrated that each link in the hypothetical chain of events is more likely than not to occur, as "[i]t is the likelihood of all necessary events coming together that (b) (6), and a chain of events cannot be more likely than its least likely link." (b) (6)

As the respondent has not established that (b) (6) in Haiti have (b) (6), we find that his motion is not exempt from the noted statutory bars. Therefore, we find that neither reopening nor a stay of removal is warranted. Accordingly, the following order shall be entered.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date: FEB - 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Lara A. Miranda-Gaffar, Esquire

ON BEHALF OF DHS: Sarah B. Campbell
Assistant Chief Counsel

APPLICATION: Reopening

The Board's last decision in this matter, issued on June 10, 2015, and re-issued on December 1, 2015, denied the respondent's motion to reopen proceedings. The respondent filed another motion to reopen on December 24, 2015. The Department of Homeland Security opposes the motion.

In support of the motion, the respondent submits the order of a New York court issued on (b) (6), 2015, vacating the sentence imposed for his drug offense in 1995, and re-sentencing him as a youthful offender. The court's order stated that the adjudication as a youthful offender "was proper and mandatory." In his September 14, 2014, decision, the Immigration Judge had noted that the respondent's 1995 conviction barred him from eligibility for cancellation of removal because it cut off the continuous residence required for relief under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). In view of the totality of the circumstances presented, including the new evidence relating to the respondent's 1995 conviction, we will reopen the proceedings and remand the case to the Immigration Judge to allow the parties to address the possible impact of the state court order on the respondent's case. On remand, the burden will be on the respondent to establish that he is eligible for and deserving of the relief sought.

Accordingly, the following order will be entered.

ORDER: The motion to reopen is granted and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for the entry of a new order.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New Orleans, LA

Date:

FEB 24 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Danielle M. McLaughlin, Esquire

APPLICATION: Reopening

This matter was last before us on September 27, 2013, when we remanded the record for further consideration of the respondent's motion to reopen. In a decision dated August 19, 2014, the Immigration Judge denied the respondent's motion to reopen. The respondent, a native and citizen of Honduras, appeals from that decision. The respondent has also filed a motion to remand. The Department of Homeland Security has not responded to the appeal or the motion. The motion to remand will be granted.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

This matter has a long and complicated procedural history. The respondent was ordered removed from the United States on May 31, 2005. He appealed from that decision but ultimately withdrew his appeal and was removed from the United States on November 17, 2005. On December 27, 2010, the respondent filed a motion to reopen with the Immigration Judge based on *Lopez v. Gonzales*, 549 U.S. 47 (2006), which he argued constitutes a fundamental change in law affecting his eligibility for cancellation of removal for certain permanent residents pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Immigration Judge denied the respondent's motion in a decision dated January 11, 2011, finding he lacked jurisdiction over the motion pursuant to the departure bar. *See* 8 C.F.R. § 1003.23(b). The Board dismissed the respondent's appeal from that decision on July 18, 2011. The United States Court of Appeals for the Fifth Circuit granted the respondent's subsequent petition for review and remanded to the Board for further proceedings, holding that the departure bar regulations impermissibly conflict with the respondent's statutory right to file a motion to reopen pursuant to section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7). (b) (6) (5th Cir. 2012). On September 27, 2013, we remanded the record for further consideration of the respondent's motion to reopen and on August 19, 2014, the Immigration Judge once again denied the motion.

On remand, the Immigration Judge concluded that the respondent established a general and reasonable likelihood of success on the merits of his application for cancellation of removal but found that motion to reopen was untimely and that he lacked authority to reopen proceedings sua sponte notwithstanding the Fifth Circuit's holding in (b) (6).

The Immigration Judge further concluded that he lacked authority to grant the respondent's request for equitable tolling of the motions filing deadline, which he found was considered a request for sua sponte reopening under the law of the Fifth Circuit. The respondent has appealed from that decision.

While the respondent's appeal was pending, he filed a motion to remand based on the Supreme Court's decision in *Mata v. Lynch*, --- U.S. ---, 135 S.Ct. 2150 (2015), in which the Court held that the Fifth Circuit impermissibly interpreted a request for equitable tolling of the motions deadline as a request for sua sponte reopening. Thus, despite Fifth Circuit case law to the contrary, a request for equitable tolling is a separate request from one that seeks sua sponte reopening. In the instant case, the Immigration Judge did not determine whether the respondent had demonstrated that equitable tolling of the filing deadline was warranted because he concluded that he lacked authority to grant such a request. Accordingly, the record will be remanded for the Immigration Judge to further consider the respondent's motion to reopen in light of the Supreme Court's holding in *Mata v. Lynch*, *supra*, and to determine in the first instance whether equitable tolling of the motions deadline is warranted.

In light of the foregoing, the respondent's motion to remand will be granted. Because the record will be remanded, we do not reach the arguments raised on appeal. The following orders will be entered.

ORDER: The respondent's motion to remand is granted.

FURTHER ORDER: The record is remanded for further proceedings and the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date: FEB 12 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Cheryl Ruggiero, Esquire

ON BEHALF OF DHS: Cynthia Gutierrez
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on September 24, 2015, when we denied the respondent's motion to reopen. On October 26, 2015, the respondent filed another motion to reopen. The Department of Homeland Security (DHS) has opposed the motion. The motion will be denied.

The respondent's motion to reopen is untimely and number-barred. Section 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, argues that his proceedings should be reopened based on ineffective assistance of counsel by attorney Ramiro Castro, who represented him before the Immigration Judge and on appeal, and attorney Hector Cavazos, whom he retained to file his prior motion to reopen. The respondent also argues that the motion to reopen time and number limitations should be equitably tolled based on the ineffective assistance by his former counsels.

We first note that the respondent has not complied with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), for making valid ineffective assistance of counsel claims, and he has not provided sufficient explanations why he could not do so. The respondent admits that he has not complied with the *Lozada* requirements (Motion, at 9). Although he has submitted his declaration regarding his representation by former counsels, this declaration provides no details surrounding the attorney's admission of factual allegations made in the Notice to Appear, which is the core of his ineffective assistance of counsel claim against attorney Castro (as discussed below). The respondent's current counsel also submitted a declaration, stating how she has communicated with attorney Emily Chrim, who submitted the respondent's prior motion to reopen, and tried to obtain the respondent's files. However, neither declaration states that the respondent communicated his ineffective assistance of counsel claims to his former counsels, or explains why he could not do so.

The respondent also admits that he has not filed a bar complaint against any of his former counsels. The respondent states that "I never made a formal complaint against Mr. Castro because I usually don't do things like that and I'm unsure about the process" and "I never made a

formal complaint against Mr. Cavazos because he already was suspended by the State Bar" (Motion Exh. Declaration of (b) (6), at 3-4). However, the respondent states that he has been advised to make such complaints against them and "may" submit bar complaints once his current counsel obtains his file from the Board (*id.*). The current counsel's declaration states that the respondent has not wanted to submit formal complaints against former counsels as a result of "extreme anxiety, depression[,] and inability to focus," despite her advice to do so (Declaration of (b) (6), at 3-4).

The respondent's anxiety, depression, and general unwillingness to file a bar complaint does not provide a sufficient explanation for his failure to communicate his ineffective assistance of counsel claims to his former counsels or to file bar complaints against them, especially when he was advised to do so by his current counsel and is now assisted by the current counsel.¹ Furthermore, although attorney Cavazos was suspended from the practice of law, this suspension appears to be for a finite period, which allows the possibility of his reinstatement in the future. Therefore, a bar complaint against him would not be necessarily futile. As to attorney Emily Chrim, who actually submitted the respondent's prior motion to reopen, the respondent does not state that he communicated his ineffective assistance of counsel claim to her or will file a bar complaint against her. In sum, the respondent has not complied with the requirements set forth in *Matter of Lozada* and has not sufficiently explained why he could not do so, for making valid ineffective assistance of counsel claims.

In addition, even if the motion to reopen time and number limitations were equitably tolled, the respondent did not show that the admission of factual allegations should be permitted to be withdrawn or his proceedings should be reopened based on the claimed ineffective assistance of counsel. The respondent argues that attorney Castro provided him ineffective assistance of counsel by not challenging the respondent's removability. However, the record shows that attorney Castro had denied removability and also submitted a motion to terminate the proceedings on or about August 21, 2013, although the Immigration Judge denied this motion (Exhs. 4, 6). The respondent's ineffective assistance claim rather appears to be that attorney Castro did not contest, but rather admitted, the factual allegations made in the Notice to Appear, especially the allegations that the controlled substance involved in his 1999 and 2003 convictions was cocaine (Motion, at 10).

In *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986), the Board held that a formal admission or concession made during a proceeding by an attorney is binding on the alien and will not be set aside, absent "egregious circumstances." In that decision, the Board noted that such "egregious circumstances" may be found if: (i) the admission or concession was the result of unreasonable professional judgment, i.e., ineffective assistance of counsel; (ii) the admission or concession was so unfair that they have produced an unjust result; or (iii) the factual admissions or concession of removability was untrue or incorrect. *Matter of Velasquez*, *supra*, at 383. As the United States Court of Appeals for the Ninth Circuit observed, all three types of

¹ The respondent's motion cites caselaw stating that compliance with *Matter of Lozada* may not be necessary if the ineffective assistance of counsel is clear (Motion, at 6-7). However, the respondent does not explain how this principle applies in his case.

“egregious circumstances” identified in *Matter of Velasquez* are related to the due process guarantee that removal proceedings accord with fundamental fairness, i.e., that evidence relied on in removal proceedings must be probative and its use must be fundamentally fair. *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 831 (9th Cir. 2011), citing *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003); *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995).

In *Santiago-Rodriguez v. Holder*, the Ninth Circuit noted that, if the attorney admitted the allegations or conceded the client’s removability without a factual basis for doing so, that circumstance would justify disregarding the admissions based on ineffective assistance of counsel. *Santiago-Rodriguez v. Holder*, *supra*, at 832. The Ninth Circuit also cited with approval the Board’s unpublished decisions where the Board found “egregious circumstances” based on ineffective assistance of counsel, where the attorney made an admission or concession without first speaking to the respondent or discussing the factual allegations with the client. *Id.* On the other hand, where the attorney, after carefully weighing all the relevant facts and exploring the available legal options, decides that the best course of action is to make the admission or concession, the Ninth Circuit noted that it is unlikely that the attorney rendered ineffective assistance, even if that decision appears unwise in hindsight. *Id.*, at 832-33, citing *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101-02 (9th Cir. 2009); *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367 (9th Cir. 1984); *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1142 (9th Cir. 1981).

In *Santiago-Rodriguez*, the Ninth Circuit found that the attorney’s admission of the factual allegation without any factual basis constituted ineffective assistance of counsel. *Santiago-Rodriguez v. Holder*, *supra*, at 835. Specifically, the Notice to Appear alleged that the alien was involved in alien smuggling of his wife and brother; the alien testified that he was involved in smuggling of his wife only, but not of his brother. The Ninth Circuit noted that, despite the discrepancy between her client’s story and the allegations in the Notice to Appear, the counsel did not investigate any details, nor did she inform the client that she intended to admit the allegations that he had smuggled both his wife and brother. Since the allegation of smuggling the alien’s brother was untrue and incorrect, the Ninth Circuit found that binding the alien to that admission would produce an unjust result. Therefore, the Ninth Circuit concluded that egregious circumstances existed in that case that permitted the alien to withdraw the admission.

Unlike the alien in *Santiago-Rodriguez*, the respondent does not argue, and has not shown, the existence of egregious circumstances discussed in *Matter of Velasquez*. The respondent has submitted a declaration, but he does not claim that the allegations regarding cocaine were incorrect or the admission was made without his authorization (Motion Exh. Declaration of (b) (6)). Furthermore, the record indicates that the controlled substance involved in the respondent’s 2003 criminal case was, in fact, cocaine (Motion Exh. G). Under these circumstances, the respondent did not show that the admission of the factual allegations produced an unjust result.

The respondent suggests that the Board “acknowledged that ineffective assistance of counsel should have been argued” in the prior decision, because the Board noted that “the respondent, through his former counsel, admitted the factual allegations made in the Notice to Appear” and also noted that the respondent has not “attempted to pursue a claim of ineffective assistance of

counsel" against attorney Castro. (b) (6) (BIA Sep. 24, 2015) (Motion, at 9). However, it is hardly unusual that represented aliens make pleadings through their counsels. The Board noted in the prior decision that the respondent has not attempted to pursue a claim of ineffective assistance of counsel against attorney Castro, not necessarily to imply that such an argument should be made as the respondent suggests, but to note that it was unnecessary that the Board should discuss or address such a claim in the prior decision. Based on the above, the respondent did not show that the admission of factual allegations should be withdrawn, or his proceedings should be reopened, based on the ineffective assistance by attorney Castro.²

The respondent's ineffective assistance claim against attorney Cavazos is based on that attorney's suspension from the State Bar of California, which in turn was based on charges of misconduct in several client matters (Motion, at 3; Motion Exh. D). Nevertheless, these documents do not necessarily show how attorney Cavazos provided ineffective assistance in the respondent's case, or how his action or inaction may have affected the outcome of the respondent's case. See *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857-58 (9th Cir. 2004). Furthermore, the respondent's prior motion to reopen was filed not by attorney Cavazos but by attorney Emily Chrim, who appears to have been associated with the practice of attorney Cavazos. The respondent suggests that "it is unclear whether she had the file, or time, to adequately prepare the case, as she was in and out of that firm quickly" (Motion, at 3). Nevertheless, the respondent does not point to specific substantive or procedural defects in the respondent's prior motion submitted by attorney Chrim. The record shows that attorney Chrim's motion discussed pertinent facts and the law, and urged the Board to terminate the respondent's proceedings, although the Board disagreed with these arguments. The respondent has not shown how the outcome of his prior motion to reopen may have been different if his motion were prepared and submitted by a competent counsel. Based on the above, the respondent did not show that the admission of factual allegations should be withdrawn, or his proceedings should be reopened, based on the ineffective assistance by his former counsels.³ Based on the above, the respondent's motion will be denied.

² We also note that, if and to the extent attorney Castro provided ineffective assistance and prejudiced the respondent's case by admitting the factual allegations made in the Notice to Appear, this would not necessarily require termination of the respondent's proceedings. Rather, it would require a remand and further factual development. The respondent's admission at the outset of the proceedings relieved the DHS of the obligation to present further evidence on the factual question of the nature of the drug offense. See *Perez-Mejia v. Holder*, 663 F.3d 403, 415 (9th Cir. 2011); *Hoodho v. Holder*, 558 F.3d 184, 191 (9th Cir. 2009). Therefore, as noted in the Board's prior decision, the DHS had no reason to provide additional state court convictions documents which might exist (b) (6).

³ The respondent has not explicitly claimed that attorney Chrim provided ineffective assistance by not making an ineffective assistance of counsel claim in the prior motion. Even if the respondent had done so, such claim would have been rejected, inasmuch as such a claim would (continued...)

(b) (6)

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, appearing to be 'Mh' followed by a horizontal flourish.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Hartford, CT

Date: MAY 12 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Muneer I. Ahmad, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Reopening

The respondent has filed a motion to reopen his removal proceedings with the Board. Section 240(c) of the Immigration and Nationality Act, 8 U.S.C. § 1229(c); 8 C.F.R. § 1003.2(c). We will deny the motion.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

On March 10, 2008, the Department of Homeland Security (“DHS”) charged the respondent as removable under sections 237(a)(2)(A)(iii), (B)(i) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i) (Exh. 1). The respondent admitted the factual allegations, conceded removability as charged, and filed a (b) (6)

(b) (6). On February 27, 2009, the Immigration Judge denied the respondent’s application for relief for failure to meet his burdens of proof, and ordered him removed to Haiti. The respondent timely appealed to the Board, and on May 27, 2009, the Board dismissed his appeal. The respondent filed a petition for review with the United States Court of Appeals for the Second Circuit, which denied his petition in a decision issued on (b) (6), 2012 (Exh. T to Respondent’s Motion to Reopen (Order in (b) (6) (b) (6) (consolidated) (2d Cir. 2012))).

On August 4, 2011, the respondent filed a motion to reopen with the Board, arguing that the (b) (6) in Haiti qualified as (b) (6) upon return.

Section (b) (6)

On September 19, 2011, the Board denied the motion to reopen, and on February 28, 2012, the

(b) (6)

Second Circuit denied the respondent's petition for review from the Board's September 29, 2011, decision.

Presently before the Board is the respondent's second motion to reopen, filed on March 16, 2016, which asserts 3 bases for reopening his removal proceedings. First, the respondent contends that (b) (6) 2011 for (b) (6). Second, the respondent contends that he is disabled as the term is defined under the Rehabilitation Act of 1973, 29 U.S.C. § 794, that he was denied access to his removal proceedings on account of his disability, and that reopening would be a reasonable accommodation of his disability. Third, the respondent contends that the Board should reopen sua sponte because his removal would be unjust, and because the Board's 2014 decision in *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), represents a change in the law that places into doubt whether he has incurred an aggravated felony conviction that renders him removable and ineligible for relief. We will deny the motion to reopen.

As to the respondent's first argument, the record does not support his claim that (b) (6) 2011 such that (b) (6) (Respondent's Brief at 11-21). Section (b) (6) of the Act; (b) (6) (BIA 2002) (for an (b) (6), it must cause (b) (6)); accord, (b) (6) (2d Cir. 2007). We have reviewed the affidavits and articles submitted, including the March 9, 2016, affidavit of (b) (6), and the report titled "(b) (6)," and we have taken administrative notice of the 2015 *Country Reports on* (b) (6) (Exhs. CC, FF to Motion to Reopen). 8 C.F.R. § 1003.1(d)(3)(iv).

The record evidence in its entirety supports the conclusion that respondent has not met his burden of proof for (b) (6). (b) (6)'s allegations that, since 2011, Haiti has implemented a policy of (b) (6) are anecdotal in nature, and insufficient standing alone to demonstrate that the respondent is more (b) (6) upon return. Further, nothing in the 2015 (b) (6) upon return. (b) (6) (2d Cir. 2007) (where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous).

Furthermore, the respondent has not demonstrated (b) (6) eligibility on the grounds that he is (b) (6) in Haiti, either (b) (6) (Respondent's Brief at 16-21). See (b) (6) (A.G. 2006) (to qualify for (b) (6), the respondent must demonstrate that each step in the chain of events is more likely than not to happen). There is insufficient evidence that the respondent (b) (6) upon him. (b) (6) The record instead reflects that conditions in Haiti, particularly given (b) (6) and

(b) (6)

(b) (6), and that (b) (6) is due to a (b) (6) (Exh. CC to Motion to Reopen (March 9, 2016, Affidavit of (b) (6)) at ¶¶ 38, 41; Exh. DD to Motion to Reopen (March 10, 2016, Declaration of (b) (6), Esquire) at ¶¶ 23-42; *see also* Exh. EE to Motion to Reopen (March 6, 2016, Letter of (b) (6), M.D., PHD.); *see also* 2015 (b) (6) at 30-31). (b) (6). The record also reflects that (b) (6).

Thus, the respondent's motion to reopen his (b) (6) claim on the basis of (b) (6) is not supported by the record, and will be denied.

We will also deny the respondent's request that we reopen his proceedings as a reasonable accommodation of his disability under the Rehabilitation Act (Respondent's Brief at 21-25). The respondent's motion on this basis is both time-barred and numerically barred, as there is no evidence that this claim is based on new, previously unavailable evidence. 8 C.F.R. § 1003.2(c)(1). In fact, the Second Circuit rejected the respondent's argument that the Board violated his due process rights by denying his motion for an extension of time to file a reply brief with the assistance of counsel (Exh. T to Motion to Reopen (Order in (b) (6) (consolidated) (2d Cir. 2012) at 7-8)).

Further, the respondent's citations to the orders of the Central District of California in *Franco-Gonzalez v. Holder*, Nos. 10-02211, 2013 WL 8115423 (C.D. Cal. 2013) and 2014 WL 5475097 (C.D. Cal. 2014) are unavailing (Respondent's Brief at 22-25 and n.3). Not only are the court orders out-of-circuit and not controlling, but there are no claims or evidence that the respondent lacks mental competency for purposes of his proceedings. *Matter of M-A-M*, 25 I&N Dec. 474, 479 (BIA 2011) (an alien is competent for purposes of immigration proceedings if he or she has a rational and factual understanding of the nature and object of the removal proceedings, can consult with an attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses).

Lastly, we will deny the respondent's request for reopening sua sponte (Respondent's Brief at 25-33). 8 C.F.R. § 1003.2(a); *Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997) ("The power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship."). We do not agree with the respondent's contention that a "proportionality analysis" applies in determining whether we should reopen proceedings sua sponte (Respondent's Brief at 25-29).

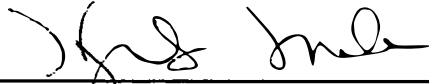
Further, we do not agree that reopening is warranted in light of the Board's decision in *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014) (Respondent's Brief at 29-33). The respondent has presented no evidence that there is a "realistic probability" that the State of Connecticut prosecutes state offenses involving the non-federally controlled substances of benzylfentanyl and thenylfentanyl, and that his offense is therefore not a categorical match to the generic drug trafficking aggravated felony offense that renders him removable and ineligible for relief (Exh. 1; Respondent's Brief at 29-33). Sections 101(a)(43)(B), 237(a)(2)(A)(iii), 240A(a)(3) of the Act,

8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii), 1229b(a)(3); *see Matter of Ferreira, supra*, at 421-22.

For these reasons, we will deny the respondent's motion to reopen.

ORDER: The motion to reopen is denied.

FURHTER ORDER: The stay of removal is vacated.

A handwritten signature in black ink, appearing to read "J. [unclear] [unclear]", is written above a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

MAR 18 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jorge Guttlein, Esquire

APPLICATION: Continuance; remand

The respondent, a native and citizen of the Dominican Republic who was accorded lawful permanent resident status in June 1994, appeals the decision of the Immigration Judge dated July 14, 2015, denying a request to continue these proceedings and ordering the respondent's removal from the United States based on the charges listed in the Notice to Appear. With her appeal brief, the respondent has submitted additional evidence and moved for a remand. The respondent's appeal will be dismissed and her motion will be denied.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3).

We affirm the Immigration Judge's decision (I.J. at 1-5). The respondent has not challenged on appeal the Immigration Judge's finding that, despite the several continuances granted in this case, she had no pending applications for relief from removal when she last appeared before him on July 14, 2015. Nor has she challenged on appeal the Immigration Judge's finding, which is supported by the hearing transcript, that she conceded her removability, through her counsel, on the basis of the charges listed in her Notice to Appear (*Id.* at 4-5; Exh. 1; Tr. at 6-8). Additionally, the respondent has indicated on appeal that she has been unsuccessful in her post-conviction relief motions (Respondent's Brief at 1). As such, we find that the respondent did not establish good cause for a further continuance of her removal proceedings. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987) (the decision to grant or deny a continuance is within the discretion of the Immigration Judge, if good cause is shown, and that decision will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing); *see also Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that a continuance should not be granted where it is being sought "as a dilatory tactic to forestall the conclusion of removal proceedings").

The respondent seeks a remand to have an opportunity to apply for (b) (6), which she claims she is eligible for (Respondent's Brief at 2-3). According to the respondent, throughout the proceedings, "the [Immigration] Judge was repeatedly advised of [her] . . . (b) (6)" but, "[f]or reasons unknown, [an] acknowledgment of eligibility [made early in the proceedings] by both the [Immigration] Judge and prior counsel never materialized into an application before the Court" (*Id.*). The respondent also maintains that, because her native country is not (b) (6)

(b) (6)

(b) (6), her removal to the Dominican Republic would (b) (6) as she would be (b) (6), and with a (b) (6) her (*Id.*).

The respondent's motion included a letter from a (b) (6), dated (b) (6), 2015, stating that the respondent has been (b) (6) since (b) (6) 2012 and that her (b) (6). The motion also included a letter from the respondent's (b) (6), dated (b) (6), 2015, indicating that the respondent has (b) (6), "specifically in the context of her unsolved [i]mmigration [s]tatus," and that she needs (b) (6) (Respondent's Brief, Tab F). Additionally, the motion was accompanied by a copy of the 2014 Department of State (b) (6) for the Dominican Republic and a 2014 (b) (6) for the same country (*Id.*, Tab G).

The hearing transcript confirms that the respondent informed the Court, through counsel, about (b) (6) (Tr. at 15-17) and that the Immigration Judge acknowledged them (*Id.* at 32). However, the respondent, who was represented by counsel at all times throughout her proceedings, never informed the Immigration Judge of her desire to seek (b) (6). She did not do that even after the specific instruction by the Immigration Judge to inform the Court of any forms of relief she believed she might be eligible for (*Id.* at 22) and after being asked for a final time, at the end of her merits hearing, whether she had any additional questions (*Id.* at 54-55). Nor do we find that the respondent has meaningfully raised a case for (b) (6) in that she has not demonstrated that the Dominican Republic is (b) (6) as she alleges and that, even if that were the case, a (b) (6) would be considered to (b) (6).

To the extent that the respondent might be alleging that she received ineffective assistance from her prior counsel, such a claim has not been meaningfully raised as the respondent has not shown compliance with any of the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), including notifying her prior counsel of the allegations she is making against her and giving her an opportunity to respond to them. *See also Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003).

Given the foregoing, we decline to disturb the Immigration Judge's decision and to grant the respondent's motion to remand. Accordingly, the following orders shall be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Detroit, MI

Date:

SEP - 9 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mark A. Goldstein, Esquire


ON BEHALF OF DHS: Mark Jebson
Senior Attorney

APPLICATION: Reopening

This case was last before us on January 29, 2015, when we denied the respondent's prior motion to reopen and reconsider our dismissal of his appeal from the Immigration Judge's denial of his motion to reopen his in absentia removal proceedings. On June 18, 2015, the respondent submitted another motion to reopen pursuant to 8 C.F.R. § 1003.2. He is a native and citizen of Iraq. He seeks reopening to apply for (b) (6)

(b) (6) and a claim of (b) (6) in Iraq, including the actions of the Islamic State. The Department of Homeland Security (DHS) states that it does not oppose the respondent's motion to reopen to seek (b) (6), and that it preserves the right to argue that the respondent's request for (b) (6) is untimely. We will grant reopening to provide the respondent the opportunity to apply for any form of relief for which he may be eligible. Accordingly, the motion will be granted and the record will be remanded to the Immigration Judge for further proceedings.

ORDER: The respondent's motion to reopen is granted, and the record is remanded to the Immigration Judge for further proceedings.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) -- Orlando, FL

Date:

OCT 19 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Margaret Blot, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (not sustained)

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation (sustained)

APPLICATION: Reconsideration

The respondent has filed a timely motion to reconsider the Board's July 8, 2015, decision dismissing his appeal. The record does not contain a response from the Department of Homeland Security. The motion will be denied.

A motion to reconsider shall specify "errors of fact or law in the prior Board decision and shall be supported by pertinent authority." 8 C.F.R. § 1003.2(b); *see also Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). The respondent argues that the Board erred in concluding that he had failed to establish his statutory eligibility to pursue an application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a).

First, the respondent argues that it was error for the Board to conclude that an inconclusive record of conviction was insufficient to establish his statutory eligibility for relief. The respondent acknowledges in his motion that the statute under which he was convicted is a divisible statute, in that some of the offenses fall within the aggravated felony definition as "illicit trafficking" offenses and some do not. Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (including within the aggravated felony definition an offense of illicit trafficking in a controlled substance). The Board agreed with the Immigration Judge that the respondent's conviction documents were inconclusive with regard to whether he was convicted of conduct that would fall within the aggravated felony definition or not (i.e. the conviction documents did not establish which of the three alternative elements relating to methamphetamine that were set forth in the Criminal Information - selling, delivering, or possessing - was the basis for his conviction) (Exh. 2, Tab B at 4).

Because the specific offense for which the respondent was convicted was not evident from the conviction documents, the Board agreed with the Immigration Judge that the respondent had not met his burden of proof to show that he was statutorily eligible for cancellation of removal.

While the United States Court of Appeals for the Eleventh Circuit has not spoken on the issue, four of the six circuits that have considered the question have agreed with the Board's approach in *Matter of Almanza*, 24 I&N Dec. 771 (BIA2009), and have held that an inconclusive record of conviction is insufficient to satisfy an alien's burden of proving eligibility for discretionary relief from removal.¹ See, e.g., *Syblis v. Atty Gen'l of the United States*, 763 F.3d 348, 355-56 (3d Cir. 2014); *Sanchez v. Holder*, 757 F.3d 712, 720 (7th Cir. 2014); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009). We therefore find no error in our determination that the inconclusive conviction record was insufficient to establish the respondent's eligibility for the relief of cancellation of removal.

The respondent reiterates his appellate argument that the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), allows an alien who has submitted an inconclusive record of conviction to meet his burden of proof to establish eligibility for relief. He has not, however, presented any legal authority that would establish error in the Board's decision finding those arguments unpersuasive (Board Dec. dated July 8, 2015, at 4 n.6). The decision in *Moncrieffe* involved an alien's removability based on his conviction under a different state criminal statute that the Court concluded was not a categorical match for the aggravated felony offense. It did not involve a divisible statute subject to the modified categorical approach, nor did it involve the alien's burden of proof when seeking to establish eligibility for relief.

The respondent presents a new argument in his motion. He urges that the "probable cause affidavit" is part of the conviction record, and that it establishes that the only allegation against him in the criminal proceeding was that he possessed the methamphetamine underlying the conviction. A review of the record shows that the DHS submitted this document along with the court records relating to the respondent's conviction (Exh. 2, Tab B at 17). However, contrary to the respondent's assertion that it was an attachment to the Criminal Information, the probable cause affidavit was attached to the arrest record and incorporated by reference in that arrest record (Exh. 2, Tab B at 16). The arrest record and accompanying documents are not generally included among the documents accepted to prove a conviction, nor are they documents that would be appropriate to consult in conducting a modified categorical analysis of a conviction. Section 240(c)(3)(B) of the Act, 8 U.S.C. § 1229a(c)(3)(B) (list of documents constituting proof of a conviction); see also *Descamps v. United States*, 133 S. Ct. 2276, 2285 & n.2 (2013). Thus, we find no error in the failure to consider the facts outlined in that affidavit. The motion to reconsider will therefore be denied.

Finally, the respondent also includes a copy of the transcript of the sentencing hearing in his criminal case. This aspect of his motion is in the nature of a motion to reopen, because he has included new evidence. 8 C.F.R. § 1003.2(c)(1). The sentencing transcript, however, provides no additional information that would clarify which part of the divisible statute the respondent

¹ A fifth Circuit Court, the Ninth Circuit, initially reversed the Board's decision in *Matter of Almanza*, *supra*, but subsequently granted rehearing en banc. *Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014), rehearing en banc granted, *Almanza-Arenas v. Lynch*, 785 F.3d 366 (9th Cir. May 8, 2015).

was convicted under, so as to establish that he was not convicted of an aggravated felony. Thus, it would not affect the ultimate determination that the inconclusive conviction record was insufficient to establish that the offense was not an aggravated felony, and therefore that the respondent was unable to meet his burden of proof to establish eligibility for relief from removal. Consequently, this aspect of the motion will also be denied.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Hartford, CT

Date: SEP - 2 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Anthony D. Collins, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] -
Controlled substance violation

Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] -
Controlled substance trafficker

APPLICATION: Reopening

This matter was last before us on January 23, 2015, when we dismissed the respondent's appeal of the Immigration Judge's June 25, 2013, order finding the respondent to be ineligible for cancellation of removal for certain permanent residents. See section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The respondent timely moved the Board to reopen his proceedings on April 23, 2015. The respondent's motion, to which the Department of Homeland Security has not responded, will be denied.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In support of his motion to reopen proceedings, the respondent has submitted evidence indicating that, on (b) (6), 2015, he successfully petitioned a Connecticut state court for destruction of the record of his (b) (6) 2007, conviction for possession of a controlled substance (Respondent's Motion, Tab B). The respondent also submitted a (b) (6), 2015, decision of the Supreme Court of Connecticut holding that in 2011 the Connecticut legislature "decriminalized" the possession of less than one-half ounce of marijuana (Respondent's Motion, Tab C). *State v. Menditto*, 110 A.3d 410 (Conn. 2015); 2011 Conn. Pub. Act No. 11-71, *codified as Conn. Gen. Stat. § 21a-279a* (2011).

However, neither the authorized destruction of the public records pertaining to the respondent's conviction, nor the state courts' labeling of the respondent's conviction as "decriminalized" affects the finality of the conviction for immigration purposes. As we articulated in our prior order denying the respondent's appeal, and as was recognized by the Supreme Court of Connecticut, the effect of the Connecticut legislature's 2011 statutory

amendment was to reduce the penalty for possession of less than one-half ounce of marijuana from a potential term of imprisonment and/or a fine to a fine of between one hundred fifty and five hundred dollars. Conn. Pub. Act No. 11-71, Sections 1-2.

We acknowledge that the Supreme Court of Connecticut now considers this reduction in penalty to meet the definition of "decriminalized" for purposes of section 54-142d of the Connecticut General Statutes, which authorizes the physical destruction of certain records of conviction. However, despite the respondent's successful petition for destruction of his record of conviction under this statute, we do not find that the respondent's conviction has been vacated or that it is otherwise no longer effective for immigration purposes. The respondent cites no authority for the proposition that the state's destruction of criminal records serves to vacate the conviction to which those records pertain. Further, even assuming that this procedure under section 54-142d of the Connecticut General Statutes was considered to be a form of vacatur, the respondent does not argue and has not shown that the vacatur was premised on a procedural or substantive defect in the underlying criminal proceeding, and therefore he has not shown that any such vacatur renders the conviction ineffective for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

Moreover, the conduct for which the respondent was convicted—possession of less than one-half ounce of marijuana—has not been "legalized" by the Connecticut legislature, but instead may still be prosecuted and lead to the imposition of a fine. Conn. Gen. Stat. § 21a-279a; *see State v. Menditto*, *supra*, at 413-14 (distinguishing the term "decriminalize," which includes a change in status from a crime to a civil violation, from the term "legalize," which means elimination of all punitive sanctions). We have long held that the imposition of a fine constitutes a penalty or punishment within the meaning of the Immigration and Nationality Act. *See Matter of Ozkok*, 19 I&N Dec. 546, 551 (BIA 1988), *superseded by statute*, § 322 of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), *as recognized by Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (holding that "a fine or restitution or community-based sanctions such as a rehabilitation program, . . . deprivation of nonessential activities or privileges, or community service" would suffice as a form of punishment, penalty, or restraint on liberty, and thus, together with a finding or plea of guilty, constitute a conviction for immigration purposes).

Therefore, the respondent has not demonstrated that the stop-time rule is inapplicable to his application for cancellation of removal, and his motion will be denied.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – York, PA

Date: OCT - 6 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

ON BEHALF OF DHS: Brian G. McDonnell
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before the Board on December 20, 2012, when we denied the respondent's previous motion to reopen. On August 17, 2015, the respondent filed the instant untimely, number-barred motion reopen. See sections 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent seeks reopening to enable him to apply for a waiver of inadmissibility under section 237(a)(1)(H) of the Act, 8 U.S.C. § 1227(a)(1)(H), in light of the Board's decision in *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015) (holding that adjustment of status constitutes an "admission" for purposes of determining an alien's eligibility to apply for a waiver under section 237(a)(1)(H) of the Act). The Department of Homeland Security opposes the motion. The motion will be granted.

A fundamental change in law may warrant the exercise of the Board's sua sponte authority to reopen proceedings notwithstanding the filing restrictions imposed on motions to reopen. See *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). Upon consideration, the Board will exercise its sua sponte authority in this matter and grant the motion to reopen. See 8 C.F.R. § 1003.2(a). Accordingly, the proceedings will be reopened and the record remanded to the Immigration Judge to enable the respondent to apply for the section 237(a)(1)(H) waiver. The Board, however, expresses no opinion at this time regarding the ultimate outcome of this case.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceeding consistent with this decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Miami, FL

Date:

OCT 21 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mary Elizabeth Kramer, Esquire

ON BEHALF OF DHS: Timothy M. Cole
Assistant Chief Counsel

APPLICATION: Reopening

On June 9, 2015, the Board dismissed the respondent's appeal from the Immigration Judge's decision denying his motion to continue the proceedings and denying his application for a waiver of inadmissibility. On appeal, the respondent did not contest his removability as an alien convicted of a crime involving moral turpitude based on his conviction under Fla. Stat. § 831.02. See section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i). See also *Matter of Edwards*, 20 I&N Dec. 191, 196, n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived on appeal). The respondent has now filed a motion which by its content is a motion to reopen. See *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The Department of Homeland Security opposes this motion. The motion will be denied.

In his motion, the respondent argues that his former attorney rendered ineffective assistance of counsel when he conceded to the charge of removability on the respondent's behalf. The respondent, however, has not complied with the procedural requirements for an ineffective assistance of counsel claim. See *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2004); *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Specifically, he has not offered evidence that a complaint has been filed with the appropriate disciplinary authorities.¹

Further, the respondent has not shown that he suffered prejudice as a result of ineffective assistance of counsel. See *id.* ("Prejudice exists when the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different."); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999) (concluding that the alien had not established that "but for his counsel's deficient representation, he would not have been ordered deported"). The respondent does not

¹ The respondent has informed the Board that a complaint will not be filed because he does not see that anything is to be accomplished by filing a complaint. See Motion to Reopen at 5. We emphasize that the procedural requirements set forth in *Matter of Lozada*, *supra*, are not optional and are designed to avoid the potential for abuse by making baseless allegations.

deny the allegation set forth in the Notice of Hearing that he was convicted of uttering a forged instrument in violation of Fla. Stat. § 831.02. *See* Respondent's Motion at 2. Since the respondent's removal hearing, the United States Court of Appeals for the Eleventh Circuit has held that the crime of uttering a forged instrument in violation of Fla. Stat. § 831.02 is a crime involving moral turpitude rendering an alien inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *Walker v. U.S. Attorney General*, 783 F.3d 1226 (11th Cir. 2015). This decision is controlling here.

Accordingly, the respondent's motion to reopen will be denied.

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Arlington, VA

Date: FEB 18 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Raizza K. Ty
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] -
Convicted of crime involving moral turpitude

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude

APPLICATION: Remand

The respondent, a native and citizen of Ghana, appeals the Immigration Judge's September 17, 2015, decision denying his request for voluntary departure and ordering him removed from the United States to Ghana. On appeal, the respondent asserts that he does have a (b) (6) to Ghana, which he did not articulate before the Immigration Judge. During the pendency of the appeal, the Department of Homeland Security (DHS) filed a motion to remand to the Immigration Judge, to which the respondent did not file a response. The record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In its motion, the DHS states that "[u]pon receiving the Briefing Schedule for the respondent's appeal, the DHS became aware that the respondent may have been diagnosed with a mental issue while detained at Farmville Detention Center. At this time, the DHS does not have additional information concerning the nature of the respondent's mental health or whether such mental health issues would affect or have affected the respondent's competency" (DHS Motion to Remand at 2). The respondent did not respond to the motion. Accordingly, we will grant the DHS's motion.

Following remand, the Immigration Judge should determine whether the respondent is competent for purposes of immigration proceedings. Should the Immigration Judge determine that the respondent is not competent, he should identify and apply safeguards, hold a new hearing, and explain the competency determination and application of safeguards in his decision. See *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013), and *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015). If the Immigration Judge determines that the respondent is competent, he should articulate his reasoning in a decision that also addresses any additional applications for relief that the respondent wishes to pursue on remand.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Dallas, TX

Date: MAR 30 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Geoffrey C. Boma, Esquire

ON BEHALF OF DHS: Judson J. Davis
Senior Attorney

APPLICATION: Reopening; stay of removal

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen proceedings to reapply for (b) (6)

(b) (6). In our November 5, 2015, decision we dismissed his appeal from the Immigration Judge's August 17, 2015, decision which found him removable and denied his applications for (b) (6). The Department of Homeland Security ("DHS") opposes the motion. The motion will be denied.

I. JURISDICTION

Our final order issued on November 5, 2015. The motion to reopen and stay request was timely filed on February 3, 2016. We did not rule on the stay request on February 3, 2016, or on February 4, 2016.¹ The DHS lawfully removed the respondent from the United States on February 4, 2016 (Form I-205). We have jurisdiction over the respondent's motion because it was timely filed. In *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012), the United States Court of Appeals for the Fifth Circuit rejected the departure bar as it applies to timely motions to reopen.

II. MERITS

As noted, the DHS has advised the Board that the respondent was removed from the United States on February 3, 2016. The respondent's appellate rights before the Board were

¹ Although the respondent filed what was titled an "Emergency" Motion to Stay Removal, we have no record of counsel otherwise contacting the Board regarding an emergency stay request. See BIA Practice Manual, Chapter 6.4(d)(i) (Nov. 2, 2015) (instructions for filing a stay motion in an emergency situation can be obtained by calling (703) 306-0093).

exhausted, he was under no stay of removal at the time his departure from this country was enforced, and his removal was pursuant to a final order of removal. The respondent's lawful removal affects his eligibility for the relief he now seeks through this motion. Once the respondent was removed, he became ineligible to seek (b) (6) under section (b) (6) of the Act, which provides that an alien "who is physically present in the United States" may apply for (b) (6). See, e.g., (b) (6) (4th Cir. 2009) ("Although [the respondent] correctly asserts that the BIA has jurisdiction to entertain his motion [despite his removal], the BIA did not abuse its discretion in denying relief based on the statutory requirement that one must be present in the United States to be eligible for (b) (6). Because [the respondent] was removed pursuant to a valid order of removal, he no longer can pursue his (b) (6) application").²

As for (b) (6), these forms of relief likewise require presence in the United States because they act to preclude the removal of an alien to a certain country or countries. See section (b) (6) of the Act (providing that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's (b) (6) in that country"); (b) (6). The respondent in this case is no longer in this country such that his removal to any particular country could be precluded. Thus, the respondent's requests for such relief is now moot.

Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

² Individuals outside the United States must apply for (b) (6) under the United States (b) (6) Program.

Falls Church, Virginia 22041

File: (b) (6) – El Centro, CA

Date: APR 20 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Miguel A. Olano, Esquire

APPLICATION: Reopening; reconsideration

In a decision dated April 9, 1993, the Immigration Judge ordered the respondent's deportation to Mexico after finding him deportable as an alien who entered the United States without inspection, and as an alien convicted of a controlled substance violation. See former sections 241(a)(1)(B), (2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1)(B), (2)(B)(i). In a decision dated November 16, 2012, the Immigration Judge denied the respondent's motion to reopen the proceedings, and on March 12, 2013, the Board dismissed the respondent's appeal from the Immigration Judge's November 16, 2012, decision. On March 4, 2016, the respondent filed the instant untimely, number-barred motion to reopen. See *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); 8 C.F.R. § 1003.2(c)(2). To the extent that the respondent now challenges his deportability, the motion is also construed as an untimely motion to reconsider. See *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); 8 C.F.R. § 1003.2(b)(2). The motion will be denied.

The respondent seeks reopening to apply for (b) (6) in Mexico (b) (6) in the United States and, (b) (6), will be considered to have (b) (6). See Respondent's Motion at 5.

The filing restrictions imposed on motions to reopen do not apply to motions to reopen to apply or reapply for (b) (6) and related relief based on (b) (6) arising in the alien's country of nationality or the country to which the alien's deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See (b) (6). The alien, however, bears the "heavy burden" to show that the proffered evidence is material, reflects (b) (6) arising in the country of nationality, and supports a prima facie case for a grant of (b) (6). See (b) (6) (BIA 2007).

The evidence offered with this motion does not reflect (b) (6) arising in Mexico since the Immigration Judge's April 4, 1993, decision. *Id.*, at 253 ("In determining whether evidence accompanying a motion to reopen demonstrates (b) (6) that would justify reopening, we compare the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below"). In this regard, we note that the record does not include any evidence of (b) (6) in Mexico at the time of, or prior to, the respondent's 1993 deportation hearing.

The evidence offered with the motion also does not support a prima facie case for a grant of (b) (6). It has not been shown that the respondent's (b) (6) for immigration purposes. See (b) (6) (BIA 2014) ("[T]he (b) (6) considers whether those with a (b) (6) are set apart, or distinct, from other (b) (6) in some significant way. In other words, if the (b) (6) were known, those with (b) (6) "). The respondent's evidence does not show that "[Mexican] (b) (6) ." (b) (6) (BIA 2014). See (b) (6) (9th Cir. 2010). Indeed, the evidence lacks any (b) (6) of the respondent's (b) (6).

Finally, while the respondent has offered evidence of (b) (6) in Mexico, including (b) (6), such generalized evidence is insufficient to show that (b) (6).

The respondent also seeks reopening based on a claim of ineffective assistance of counsel because his former attorney did not apply for relief on his behalf (b) (6) in Mexico. See Respondent's Motion at 6. The respondent, however, has not complied with the notice and complaint requirements for an ineffective assistance of counsel claim before this Board as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The respondent asserts that compliance with the *Lozada* requirements is unnecessary in his case because "ineffective assistance of counsel is plain on the record as it is void of any application for (b) (6) and related forms of relief." See Respondent's Motion at 6. We are unpersuaded by this assertion, however, because the respondent has offered no argument or evidence to establish prima facie eligibility for any form of relief from deportation at the time of the hearing before the Immigration Judge. See *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (to prevail on an ineffective assistance of counsel claim, the alien must demonstrate that counsel failed to perform with sufficient competence and that she was prejudiced by counsel's performance); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (prejudice requires a showing that counsel's performance was so inadequate that it may have affected the outcome of the proceedings). Nor has the respondent shown due diligence in pursuing his ineffective assistance of counsel claim. See *Avagyan v. Holder*, 646 F.3d 672 (9th Cir. 2011).

In sum, it has not been shown that equitable tolling of the filing deadline based on an ineffective assistance of counsel claim applies to this motion. *See Iturribarria v. I.N.S.*, 321 F.3d 889, 897 (9th Cir. 2003) (equitable tolling is available to an alien who is prevented from timely filing a motion to reopen due to ineffective assistance of counsel). It has also not been shown that reopening to enable the respondent to apply for (b) (6) and related relief based (b) (6) in Mexico is warranted in this case. *See* 8 (b) (6). Indeed, it does not appear that any other exception to the filing deadline imposed on motions to reopen applies to this motion. *See generally* (b) (6).

Finally, we find no exceptional situation in the respondent's case to warrant the exercise of our limited sua sponte authority to reopen the proceedings or to reconsider our prior order. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (discussing the Board's limited authority to reopen and reconsider cases sua sponte in exceptional situations); 8 C.F.R. § 1003.2(a). The respondent contends that the conviction underlying his deportability as an alien convicted of a controlled substance violation is not viable for immigration purposes, and that the proceedings should, therefore, be terminated. It has not been shown, however, that the conviction was vacated due to a defect in the underlying criminal proceedings, and the conviction, therefore, remains viable for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (holding that if a court vacates a conviction based upon a procedural or substantive defect in the underlying proceedings, there is no longer a conviction for immigration purposes), *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). Nor has the respondent offered any authority to show that the crime underlying his conviction under section 11357(a) of the California Health and Safety Code is not a "controlled substance violation" rendering him deportable under section 241(b)(2)(B)(i) of the Act.¹

Finally, to the extent that the respondent seeks an order "to restore [him] to his status as a lawful permanent resident," purportedly granted under an alternate alien number, he has offered no evidence to establish that he ever became a lawful permanent resident. *See Respondent's Motion at 4.*

For the foregoing reasons, the respondent's motion to reopen and reconsider will be denied.

ORDER: The motion to reopen and reconsider is denied.


FOR THE BOARD

¹ If the conviction were not viable for immigration purposes, the respondent would nevertheless remain deportable under section 241(b)(2)(B)(i) of the Act.

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date: OCT - 2 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se¹

ON BEHALF OF DHS: Sherry A. Nohara
Senior Attorney

APPLICATION: Reopening

This matter was last before the Board on August 29, 2013, when we dismissed the respondent's appeal. On August 31, 2015, more than 2 years after the Board's order, the respondent filed a motion to reopen. The Department of Homeland Security has opposed the motion. The motion will be denied.

The respondent's motion is untimely, as it was not filed within 90 days of the Board's final administrative decision. Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, urges that his motion falls within the exception to the time limitations for motions to reopen to apply or reapply for (b) (6) arising in the country of nationality. Section (b) (6) of the Act (b) (6).

Specifically, the respondent argues that (b) (6) in El Salvador (b) (6) since his hearing,² because the (b) (6) in 2014 and (b) (6), and

¹ The respondent states in his affidavit that his documents were drafted by another individual, who "wishes to seal his identity to avoid problems or to be singled out or targeted by DHS/ICE's arbitrary agents" (Motion Exh. A, at 1). We note that preparation of motions or documents on behalf of an alien filed before the Board constitutes a "practice" before the Board and therefore "representation" of the alien. 8 C.F.R. § 1001.1(i), (k), (m). A person engaged in the practice or representation of an alien before the Board must submit a Notice of Entry of Appearance (Form EOIR-27) as set forth in 8 C.F.R. § 1292.4. In addition, an attorney engaged in the practice or representation of an alien without submitting a Notice of Entry of Appearance may be subject to disciplinary actions under the applicable federal or state laws, rules, and regulations.

² The respondent argues that his last hearing was on November 14, 2013 (Motion, at 1, 3), and that the Immigration Judge's decision was issued on March 22, 2012 (Motion, at 4). However, (continued...)

(b) (6)

the former president of El Salvador Mauricio Funes, who is credited for having negotiated the (b) (6), is no longer the president.³ The respondent argues that (b) (6), which he defines (b) (6) (Motion, at 10). The respondent also argues that the (b) (6).

In support of the motion, the respondent submitted (b) (6) application, his affidavit, and a number of recent articles and reports regarding (b) (6) in El Salvador.

The evidence submitted by the respondent is insufficient to show (b) (6) in El Salvador material to the respondent's claims for (b) (6) and related forms of relief. While the documents show (b) (6) in El Salvador, the respondent did not show that these are (b) (6) since the time of his hearing, rather than the continuation of the same or similar conditions. See (b) (6) (9th Cir. 2004) (noting that the critical question is whether circumstances have changed sufficiently that an alien who previously did not have a legitimate claim for (b) (6) now has a (b) (6), and that the new evidence of (b) (6) must be "qualitatively different" from that shown at the time of the hearing); see also (b) (6) (9th Cir. 2010). Therefore, the motion to reopen will be denied as untimely.

In addition, the respondent did not show that he is prima facie eligible for (b) (6) or related forms of relief based on the new evidence. The United States Court of Appeals for the Ninth Circuit denied and dismissed the respondent's petition for review, finding that the respondent failed to establish a (b) (6) and he did not establish that (b) (6) of El Salvador or (b) (6). (b) (6) (9th Cir. 2014) (unpublished). The documents submitted do not show that a different outcome is warranted in the respondent's case.⁴ The respondent also did not show that termination of his proceedings is warranted.

(...continued)

the record shows that the last hearing in the respondent's case was held on April 22, 2013. The respondent's motion also states that country conditions in Lebanon changed (Motion, at 4), but the respondent is a native and citizen of El Salvador (I.J. at 1; Exh. 1).

³ President Funes was replaced in June 2014 by another president, following an election earlier in that year, upon the expiration of his terms. See 8 C.F.R. § 1003.1(d)(3)(iv) (The Board may take administrative notice of commonly known facts or the contents of official documents).

⁴ We also note that the respondent stated in his affidavit that he has "(b) (6)" (Motion Exh. A, at 1), and therefore he is (b) (6). However, the record in this case shows that the respondent was involved in the trafficking of controlled substance (b) (6) claimed previously was (b) (6), i.e., the price for a (continued...)

Based on the above, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.

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FOR THE BOARD

(...continued)

substantial amount of marijuana which had been confiscated by the United States Government authority and which resulted in his drug trafficking conviction.

Falls Church, Virginia 22041

File: (b) (6) – Lompoc, CA

Date: MAR - 7 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Eman H. Jajonie-Daman, Esquire

APPLICATION: Reopening

The respondent is a native and citizen of Iraq, and (b) (6). On September 23, 2004, the Board summarily affirmed the Immigration Judge's decision. On January 19, 2016, the respondent filed the instant motion to reopen. He alleges that his proceedings should be reopened due to (b) (6) in Iraq, and has submitted evidence of (b) (6). The Department of Homeland Security has not filed a response.

The motion is untimely. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). However, the time limitation does not apply to a motion to reopen based on (b) (6). See section (b) (6) of the Act; (b) (6) (time and number limits do not apply to motions to reopen "[t]o apply or reapply for (b) (6) based on (b) (6) in the country of nationality . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing").

The additional evidence indicates that (b) (6) in Iraq, and that (b) (6) since the respondent's last hearing before the Immigration Judge. The respondent is only eligible for (b) (6) (I.J. Dec. at 4-20).¹ (b) (6) Accordingly, the following orders shall be issued.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded for further proceedings in accordance with this decision and the entry of a new decision.


FOR THE BOARD

¹ The respondent's motion suggests that he is also entitled to (b) (6). However, the Immigration Judge's decision is law of the case, and the respondent has not provided any statutory, regulatory, or precedential basis to depart from that decision.

Falls Church, Virginia 22041

File: (b) (6) -- Boston, MA

Date:

DEC 16 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Johanna M. Herrero, Esquire

ON BEHALF OF DHS: Marna M. Rusher
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on June 25, 2012, when we dismissed the respondent's appeal of the Immigration Judge's May 16, 2011, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and granting a period of voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c. We entered a final order of removal in that decision and did not reinstate voluntary departure.

The respondent, a native and citizen of El Salvador, has filed an untimely motion to reopen his removal proceedings. The Department of Homeland Security (DHS) opposes the motion. With certain exceptions not shown to be applicable here, a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. See section 240(c)(7)(C)(i) of the Act; 8 C.F.R. § 1003.2(c)(2). The present motion was filed on August 27, 2015, years beyond the 90-day deadline.

The motion does not fall within any of the exceptions to the time limits imposed on motions to reopen removal proceedings. See 8 C.F.R. § 1003.2(c)(3). The respondent appears to request equitable tolling of the timely filing requirement of the regulations, where he alleges ineffective assistance by his former counsel. Specifically, the respondent argues that because his former counsel abandoned claims for adjustment of status under section 245(i) of the Act, and special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2193, amended by Pub. L. No. 105-139, 111 Stat. 2644, the respondent was denied a reasonable opportunity to present his applications for relief (Resp. Mot. at 7-9).

The Board has considered that the respondent has substantially complied with the procedural requirements for making a claim of ineffective assistance of counsel, as set forth in *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).¹ However, the respondent has not shown due diligence in presenting

¹ We accept the respondent's explanation for not filing a complaint with the appropriate disciplinary authorities—namely, that the disbarment of his prior counsel evidences the claimed ineffectiveness (Resp. Mot. at 15). See *Matter of Lozada*, *supra*, at 639.

the claims in the pending motion. To prevail on his claim of ineffective assistance of counsel, the respondent must show not only ineffective representation, but also diligence in filing his motion. *See Bead v. Holder*, 703 F.3d 591, 594 (1st Cir. 2013) (finding that the Board's determination that an alien who sought reopening based on an ineffective assistance of counsel claim had not diligently pursued his rights, as required for equitable tolling doctrine, was not abuse of discretion); *Matter of Lozada*, *supra*.

We observe that the United States Court of Appeals for the First Circuit has not yet decided whether equitable tolling applies to the statute's 90-day deadline, despite multiple opportunities to do so. *See Bead v. Holder*, *supra*, at 594; *Bolieiro v. Holder*, 731 F.3d 32, 39 (1st Cir. 2013). Moreover, even if it were available, "equitable tolling is a 'sparingly' invoked doctrine." *Jobe v. INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc). The respondent indicates that he retained current counsel in (b) (6) 2012, and that she "thereafter engaged in a lengthy [sic] file review and background check process to discover and get up to speed with the procedural and legal issues involved in [the respondent's] matter" (Resp. Mot. at 6). We conclude that the present claims could have been raised much earlier than 3 years after current counsel was retained, where current counsel could have assessed the respondent's eligibility for the relief in question even before fully investigating the exact details of former counsel's alleged abandonment of these claims. Thus, because the respondent could have raised these claims earlier, we conclude that he has not shown that he acted with diligence in filing the motion, and we do not find that ineffective assistance of counsel tolls the timely filing requirement of the regulations.

We decline to reopen these proceedings under our sua sponte authority at 8 C.F.R. § 1003.2(a). This action is taken only in "exceptional situations," which are not presented here. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). If the respondent seeks a favorable exercise of prosecutorial discretion, he must direct his request to the DHS.

The following order will be entered.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date: SEP 14 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

On April 10, 2014, the Board denied the respondent's motion to reopen his removal proceedings, which was based on a claim of (b) (6) in China. This matter is presently before us pursuant to a (b) (6), 2015, decision of the United States Court of Appeals for the Eleventh Circuit. In its decision, the Court found that the Board abused its discretion in denying the motion, inasmuch as we failed to consider the portions of the 2009 and 2010 Annual Reports from the Congressional-Executive Commission on China ("CECC"), or the 2013 CECC Annual Report, that were submitted with the motion. The Court found that these Reports were "potentially relevant to [the respondent's] motion to reopen[.]" and has remanded the case to us for further consideration of that evidence.

We acknowledge the error in our prior decision, and have reconsidered the respondent's motion to reopen based on the entirety of the evidence submitted. Upon reconsideration, we adopt and incorporate by reference our April 10, 2014, order in this decision, except insofar as it pertains to the CECC Reports identified by the Eleventh Circuit that were mistakenly overlooked in our prior adjudication. And, upon further consideration of the respondent's motion, including those Reports, we are not persuaded that untimely reopening has been shown to be warranted.

The CECC Reports at issue do not show that (b) (6) in a way that might lead the respondent to be (b) (6), or (b) (6) to China (b) (6). The 2013 CECC Report reflects that China has, unfortunately, "continued to implement (b) (6) of Chinese citizens, especially women." (Administrative Record, ROP 7, 2013 CECC Report at 26). The Report indicates that (b) (6) using methods including (b) (6) (Administrative Record, ROP 6, 2013 CECC Report at 99). However, the 2013 CECC Report is devoid of any indication of how individuals such as the respondent who return to China (and more specifically, to his native (b) (6) Province) with (b) (6).

The excerpts of the 2009 and 2010 CECC Reports proffered by the respondent also depict China's longstanding and often (b) (6). A portion of the 2009 CECC Report states that during the reporting year, China "continued" to (b) (6), that (b) (6) was an

(b) (6)

(b) (6) Province, and that, in (b) (6) 2009, (b) (6) within (b) (6) (Administrative Record, ROP 5, 2009 CECC Report at 154-55). But that Report largely discusses (b) (6) in China. It is devoid of any indication of how (b) (6) such as the respondent, who are returning to China with (b) (6). Likewise, the 2010 CECC Report, which essentially updates the 2009 version, also provides no indication that individuals similarly situated to the respondent are (b) (6) (Administrative Record, ROP 5, 2010 CECC Report).

In consideration of the foregoing, and in conjunction with the reasoning employed in our April 10, 2014, decision that did not relate to the CECC Reports at issue here, we are not persuaded that the respondent has shown a (b) (6) in China that would excuse the untimeliness of his motion to reopen. And, we find no exceptional situation that would warrant reopening of these proceedings pursuant to our discretionary *sua sponte* authority under 8 C.F.R. § 1003.2(a). We will therefore enter the following order.

ORDER: The motion to reopen is, again, denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - New York, NY

Date: SEP 10 2015

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATION: Reopening

This case was last before us on November 28, 2011, when we denied the respondent's second motion to reopen his deportation proceedings. On June 22, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion exceeds both the time and number limitations for motions to reopen, and it will be denied.

An alien may file only one motion to reopen and, with certain exceptions, it shall be filed within 90 days of the date of entry of a final administrative order. See 8 C.F.R. § 1003.2(c)(2). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. He applied for (b) (6) in China. The Immigration Judge found that he was not credible. The respondent was granted the privilege of voluntary departure, but he failed to depart. He previously sought to have his deportation proceedings reopened to apply for (b) (6) in China and a change in the law in the United States, and to apply for adjustment of status based on an approved visa petition on his behalf. He now seeks to have his proceedings reopened to apply for (b) (6) in China. He contends that the evidence shows the (b) (6) Motion at 8.

(b) (6)

He reports that in China, he was (b) (6) in the United States. *See* Exhibit A, statement at 1.¹ He states that he will not (b) (6) if he is removed to China. *Id.* He claims that there is (b) (6) in China and the Chinese (b) (6). *Id.* The respondent declares that he will (b) (6). *Id.* He states that (b) (6). *Id.*

He offers his (b) (6) application, statement, and birth certificate, and his children's birth certificates. He also offers portions of the 2010 - 2013 International Religious Freedom Reports (IRF), excerpts from the 2011, 2013, 2014, and 2015 Annual Reports of the U.S. Commission on International Religious Freedom (USCIRF), portions of the 2009, 2012, 2013, and 2014 Annual Reports of the Congressional-Executive Commission on China (CECC), a response from the Refugee Review Tribunal of Australia, the transcript of the 2014 congressional testimony of (b) (6), research articles, media reports, and a 1997 decision of the United States Court of Appeals for the Seventh Circuit.

The instant case arises in the jurisdiction of the Second Circuit, and we decline to apply the decisions that the respondent offers and cites from outside of the Second Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time and number limitations for motions to reopen, and he has not established his *prima facie* eligibility for relief. *See Matter of S-Y-G-*, *supra* (a motion to reopen (b) (6) must also demonstrate that the applicant is *prima facie* eligible for the requested relief).

The respondent has not offered evidence to support his claim that he (b) (6) y. He has not indicated the name or location (b) (6) or evidence of (b) (6) during his residence in the United States for more than twenty years.

The evidence regarding (b) (6) China is not sufficient to demonstrate (b) (6) since the time of the respondent's hearing in 1995. The evidence reflects that China continues to (b) (6), although there have been reports of the (b) (6). *See, e.g.,* Exhibit A, 2011 Annual Report of the USCIRF at 10, 20, 124-126, 128-130; Exhibit B, 2010 IRF Report at 1-14; Exhibit HHH, 2012 Annual Report of the USCIRF at 6-7, 13, 136-139, 143-148; Exhibit III, 2013 Annual Report of the USCIRF at 6, 16, 30-32, 35-40; Exhibit JJJ, 2014 Annual Report of the USCIRF at 47-49; Exhibit KKK, 2011 IRF Report at 1-14; Exhibit LLL, 2012 IRF Report at 1-17; Exhibit MMM, 2013 IRF Report at 1-17; Exhibit CCCC, 2009 Annual Report of the CECC at 132-140; Exhibit

¹ The respondent submits two groups of exhibits, both containing exhibits labeled A-D. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits.

EEEE, 2013 Annual Report of the CECC at 21-22; Exhibit FFFF, 2012 Annual Report of the CECC at 14-15; Exhibit JJJJ, 2014 Annual Report of the CECC at 90-93, 95-99; Exhibit KKKK, 2015 Annual Report of the USCIRF at 33-36. We have found that U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part, Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Moreover, the evidence indicates that (b) (6)

has been a longstanding concern, including the time of the respondent's hearing in 1995. *See, e.g.,* Exhibit B, 2010 IRF Report at 1-14; Exhibit E, Refugee Review Tribunal of Australia response, §§ 1.1, 1.2. We conclude that the respondent's evidence is inadequate to show a

(b) (6) in China with respect (b) (6)

. *See* (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Shao v. Mukasey, supra*. We find that reports of (b) (6)

does not prima facie demonstrate that the respondent in this case has (b) (6) amounting (b) (6) his return to China (b) (6) because it does not indicate a (b) (6)

. *See* (b) (6)

(2d Cir. 2005). We conclude that the respondent has not satisfied his burden of proof to prima facie establish (b) (6)

because the evidence is not sufficient to demonstrate the (b) (6) upon his return.

The respondent has not made a prima facie showing that (b) (6)

upon his return because the evidence does not indicate a

(b) (6). *See* (b) (6).

We conclude that the respondent has not met the requirements of 8 C.F.R. § 1003.2(c)(3)(ii). His evidence is not sufficient to establish a (b) (6)

"arising in the country of nationality" so as to create an exception to the time and number limitations for filing another late motion to reopen to apply for (b) (6). *See*

(b) (6) (BIA 2006). He has not met his burden of proving that his deportation proceedings should be reopened. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the respondent's motion exceeds both the time and number limitations for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: JUN 06 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Abisag Ayala, Esquire

APPLICATION: (b) (6)

The respondent, a native and citizen of Guatemala, appeals the Immigration Judge's November 6, 2014, decision denying his applications for (b) (6). Sections (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6). We have not received a response from the Department of Homeland Security. We will dismiss the appeal.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. 1003.1(d)(3)(ii). The Immigration Judge found the respondent to be credible.¹

The respondent challenges the Immigration Judge's finding that he did not (b) (6) in Guatemala (Resp. Br. at 7-8). The respondent did not testify about his (b) (6) in Guatemala but chose to rely on his declaration (Tr. at 42; Exh. 3 Tab D).²

¹ Counsel for the respondent conceded that the respondent's first application for (b) (6) filed in 1991, was not true (Tr. at 41; Exh. 2). The Immigration Judge did not hold this fact against the respondent because the respondent is illiterate and he disclosed the discrepancies voluntarily at the beginning of the merits hearing (I.J. at 3; Tr. at 40-42). The respondent filed a new (b) (6) in 2011, setting forth a different claim (Tr. at 41). Subsequent to the Immigration Judge's decision, we issued our precedent decision in *Matter of M-A-F*, 26 I&N Dec. 651 (BIA 2015), in which we determined that where a subsequent application for (b) (6) is filed after May 11, 2005, it is subject to the provisions of the REAL ID Act, Division B of Pub. L. No. 109-13, 119 Stat. 302, when such application constitutes a new application rather than an amended or updated application. *Id.* at 655. Inasmuch as the respondent's claim is insufficient even under the more generous pre-REAL ID Act standard, we need not further address this issue. See I.J. at 2.

² On appeal, the brief asserts facts that are not in the record (Resp. Br. at 2). Statements by counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N (continued...)

(b) (6)

The Immigration Judge found that the events recounted by the respondent did not (b) (6) (I.J. at 5). The Immigration Judge accepted the respondent's claim that he (b) (6) in 1991, but determined that, even when the cumulative effect of the events was considered, they did not (b) (6). See (b) (6) (9th Cir. 2006) (b) (6) that does not (b) (6).

The respondent related a (b) (6) in 1975, (b) (6) (I.J. at 4; Exh. 3, Tab D, ¶¶ 6-7). The respondent was (b) (6). The other basis set out by the respondent in his declaration was that he was (b) (6) in Guatemala because he had heard that (b) (6), and he had (b) (6) (Exh. 3, Tab D, ¶ 8). The respondent (b) (6), but he was not (b) (6) (Id.). The Immigration Judge correctly held that the respondent did not (b) (6) in Guatemala. We agree with the Immigration Judge that the respondent did not establish (b) (6). Cf. (b) (6) (BIA 1998); see also (b) (6) (9th Cir. 2009) (finding no (b) (6) was (b) (6) for (b) (6)). The respondent did not (b) (6) (I.J. at 5). See (b) (6).

The Immigration Judge correctly found that the respondent (b) (6) of (b) (6), and this does not constitute (b) (6) under the Act. (b) (6) (BIA 2014) (b) (6) generally are not considered to be (b) (6); (b) (6) (BIA 2010) (b) (6) within a country are not entitled to (b) (6); (b) (6) (BIA 1985) (b) (6).

The respondent challenges the Immigration Judge's finding that the respondent did not establish (b) (6).

(...continued)

Dec. 503, 506 (BIA 1980). The respondent also cites to background material that is not in the record (Resp. Br. at 3). We cannot consider evidence that is not in the record. 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984). Moreover, the respondent has not otherwise shown that he has evidence was not previously available and could not have been presented at his hearing before the Immigration Judge, and should thereby be further considered. 8 C.F.R. § 1003.2(c); *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). We will adjudicate the appeal based upon the evidence contained in the record before the Immigration Judge.

(b) (6)

(Resp. Br. at 10).³ The respondent testified that he (b) (6) in Guatemala (I.J. at 4-5; Tr. at 43-45). The Immigration Judge found that the (b) (6) by the (b) (6) (I.J. at 6). The respondent did not establish (b) (6) that limit the scope of (b) (6). Section (b) (6) of the Act. The only claim presented by the respondent to the Immigration Judge was that he will be (b) (6) because (b) (6) the United States (Tr. at 45). The Immigration Judge correctly found that the respondent did not establish a (b) (6). See (b) (6) (9th Cir. 2010) (b) (6) do not bear a (b) (6); (b) (6) (9th Cir. 2008) (b) (6) for (b) (6) does not amount to (b) (6).

We uphold the Immigration Judge's determination that the respondent's (b) (6) that he (b) (6) is not a legally recognized claim (I.J. at 23-24). See (b) (6) (9th Cir. 2010). The Immigration Judge correctly determined that the respondent has not established that he is a (b) (6) under the Act (I.J. at 6). (b) (6) (BIA 2007) (holding that (b) (6)); (b) (6) (9th Cir. 2009) (holding that (b) (6)). The respondent has also not shown that the (b) (6). See (b) (6). We uphold these findings. *Matter of D R-*, 25 I&N Dec. 445, 453 (BIA 2011) (motive is a finding of fact which the Board reviews for clear error).

Inasmuch as the respondent did not meet his burden of proof for (b) (6), it follows that he cannot meet (b) (6) (I.J. at 7). See (b) (6) (1984).

Finally, we affirm the Immigration Judge's denial of the respondent's application for (b) (6) (I.J. at 7). The respondent has not demonstrated that i (b) (6) in Guatemala. See (b) (6) (A.G. 2006) (holding that each link in the hypothetical chain of events leading

³ On appeal, the respondent seeks to define (b) (6) (Resp. Br. at 7, 10). A party may not make a legal argument for the first time on appeal. See, e.g., *Matter of J-Y-C-*, *supra*; *Matter of Edwards*, 20 I&N Dec. 191, 196-97 n.4 (BIA 1990). As the respondent failed to present these (b) (6) to the Immigration Judge, we do not further consider them. See also (b) (6) (BIA 2000) (explaining it is the respondent's burden to (b) (6) before the Immigration Judge).

(b) (6)

to the claim of (b) (6) than not to occur); (b) (6) (BIA 2002) (rejecting claim based on “a chain of assumptions and (b) (6), rather than evidence that meets [the] burden of demonstrating that (b) (6)” (emphasis in original)). The respondent did not testify that he had (b) (6) and did not state a basis for (b) (6) in this regard.

The respondent did not assert that he (b) (6) of Guatemala (b) (6) him. The respondent has not asserted that (b) (6) is a (b) (6) and has not met his burden of showing (b) (6) in (b) (6). See (b) (6) (BIA 2000) ((b) (6)); see also (b) (6) (9th Cir. 2003) ((b) (6)). Further, the respondent did not submit any evidence to establish that (b) (6) in the event of his return (I.J. at 7). See (b) (6) (9th Cir. 2003).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

SEP - 8 2015

In re: (b) (6)

IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Theodore N. Cox, Esquire

APPLICATION: Reopening; termination of proceedings

ORDER:

This Board has been advised that the applicant has become a lawful permanent resident. Accordingly, these exclusion proceedings are reopened and terminated. The record is returned to the Immigration Court without further action.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

In re: (b) (6)

SEP - 2 2015

IN DEPORTATION PROCEEDINGS

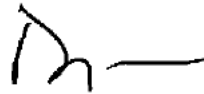
MOTION

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Reopening; termination

ORDER:

The respondent has filed a motion to reopen and terminate these deportation proceedings based on the respondent's acquisition of (b) (6) status. The Department of Homeland Security (DHS) has not opposed the motion. See 8 C.F.R. § 1003.2(g)(3). Considering the respondent's present status and the circumstances presented, the proceedings are reopened under the provisions of 8 C.F.R. § 1003.2(a), and terminated. See 8 C.F.R. § 214.14(c)(5)(i). The record is returned to the Immigration Court without further action.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Newark, NJ

Date:

In re: (b) (6)

SEP - 8 2015

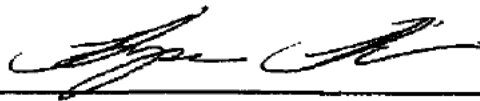
IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Gerald Karikari, Esquire

ORDER:

The proceedings are reopened under the provisions of 8 C.F.R. § 1003.2(a). Given the uncontested evidence that the applicant has now been granted (b) (6) status under section (b) (6) of the Immigration and Nationality Act, (b) (6), the proceedings are terminated without prejudice and the record is returned to the Immigration Court without further action.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date: **JUN 23 2016**

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Camille K. Cook, Esquire

APPLICATION: Reopening

This case was last before us on December 20, 2012, when we dismissed the respondent's appeal from the Immigration Judge's February 25, 2011, decision denying her request for voluntary departure. On April 20, 2016, the respondent filed a motion to reopen. The Department of Homeland Security (DHS) has not responded to the motion, which will be denied.

Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i), provides that motions to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." We entered the final order of removal in the respondent's case on December 20, 2012. She did not, however, file her current motion until more than 3 years later. The respondent's motion to reopen therefore is untimely.

The respondent does not claim that her motion fits within any of the statutory or regulatory exceptions to the deadline for filing a motion to reopen, and we do not find that any of these exceptions apply to her case. See section 240(c)(7)(C)(ii) – (iv) of the Act; 8 C.F.R. § 1003.2(c)(3). The respondent instead asserts that the deadline for filing her motion should be tolled because she has been the victim of ineffective assistance of counsel by her prior attorney.

The United States Court of Appeals for the Ninth Circuit, the circuit in which the respondent's case arises, has held that equitable tolling of the time limit for a motion to reopen is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003). When assessing due diligence, one issue to consider is whether and when a reasonable person in the petitioner's position would suspect the specific fraud or error underlying her motion to reopen. See *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011).

In the present case, the respondent has not demonstrated that she acted with due diligence because she does not sufficiently explain why she did not pursue an ineffective assistance claim beginning in 2011, which is when a reasonable person would or should have known about the

purported ineffective assistance of counsel.¹ *Id.* Further, even if the respondent had demonstrated that she acted diligently, she has not shown that her former counsel committed errors rising to a level that could be considered ineffective assistance. *See Iturribarria v. INS, supra*, at 899-900.

The respondent states that her original (b) (6) application was prepared by a notario who, unbeknownst to her, provided incorrect information regarding her (b) (6). *See* Respondent's Motion at 5. She contends that, after she retained her former attorney, he did not go through that information with her or correct any mistake in the application, and she was therefore denied relief on account of (b) (6). *Id.* at 4. The respondent claims that she did not know her (b) (6) application contained incorrect information involving her (b) (6) until 2016, when she consulted with her current attorney.² *Id.*, Exh. 1 at 1. The respondent notes that she filed the present motion to reopen shortly after meeting with her current attorney and discovering the incorrect information.

The respondent has not met her burden of showing that she was not aware or should not have been aware of the statements in her (b) (6) application before February 2016. *See Avagyan v. Holder, supra*. The respondent's claim to lack of knowledge is contradicted by her former counsel's reply to the letter apprising him of the purported ineffective assistance. *See* Respondent's Motion at Exh. 15. In that reply, her former counsel notes that he fully discussed the contents of the respondent's (b) (6) application with her and also discussed other options for relief, including voluntary departure and the pursuit of her visa petition. *Id.*

The transcript of the respondent's hearing also undercuts her contention that she was unaware of the contents of her (b) (6) application. During a hearing on February 25, 2011, it was noted that the respondent's former counsel had previously indicated that he planned to file a retraction of the statements in the (b) (6) application (Tr. at 20). *See* Respondent's Motion at Exh. 7. He did not file that retraction however, because, as he confirmed during the hearing, the contents of the (b) (6) application were true (Tr. at 20). *Id.*

Considering these facts, we conclude that the respondent was, or should have been, aware of the contents of her (b) (6) application before 2016. If incorrect information had remained in the application, a reasonable person should and would have had concerns about the ineffective

¹ We acknowledge that the respondent submitted evidence demonstrating that she generally satisfied the procedural requirements which must be met before we will reopen proceedings on the basis of a claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Nonetheless, a showing that the procedural requirements have been met must also be accompanied by a showing of due diligence. *See Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011) (noting that to qualify for equitable tolling on account of ineffective assistance, a petitioner must demonstrate, inter alia, that she acted with due diligence in discovering counsel's fraud or error *and* that she complied with the procedural requirements) (emphasis added).

² Although the respondent claims that the information in her (b) (6) application is incorrect, she has not submitted a revised statement regarding (b) (6) in Peru.

assistance of prior counsel beginning in 2011, when the Immigration Judge denied relief. *See Avagyan v. Holder, supra*. Yet the respondent did not pursue her claim until 2016. Accordingly, we conclude that the respondent has not acted diligently in pursuing her ineffective assistance of counsel claim and has not met her burden of establishing that she is entitled to equitable tolling of the deadline for filing a motion to reopen. *See Iturribarria v. INS, supra*.

In addition, even if the respondent had shown that she acted diligently, we also conclude that she has not shown errors rising to the level of ineffective assistance. *See Iturribarria v. INS, supra*, at 899-900. As discussed above, the respondent's former counsel notes in his reply that he fully discussed both the contents of the application with her and other options for relief. *See Respondent's Motion at Exh. 15*. His reply also indicates that the respondent was informed of and played a role in deciding what relief she wanted to pursue. *Id.* Considering the foregoing, it appears that the former attorney's decisions regarding the presentation of the respondent's case, including the decisions to pursue a "(b) (6)" argument and to have the respondent not testify about her "(b) (6)", were tactical ones. Even if they appear ill-advised in hindsight, such decisions do not support a claim to ineffective assistance of counsel. *See Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) (noting that an attorney's tactical decisions in the preparation and presentation of an alien's case generally do not rise to the level of ineffective assistance of counsel).

As a result, we conclude that the respondent is not entitled to reopening of her proceedings due to ineffective assistance of counsel.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: MAY 16 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elsa I. Martinez, Esquire

APPLICATION: Reopening

On February 16, 2016, the respondent, a native and citizen of Mexico, filed a motion to reopen to afford him the opportunity to apply for suspension of deportation under former section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254a. The motion will be denied as untimely filed.

The respondent seeks reopening under section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2) to afford him the opportunity to apply for suspension of deportation. The Board last entered an order in this case in 1999, when we dismissed the respondent's appeal from an Immigration Judge's 1996 decision denying his motion to reopen. He asks that the 90-day motion time limit be equitably tolled based on his claim of ineffective assistance of counsel.

The United States Court of Appeals for the Ninth Circuit, the jurisdiction wherein the respondent's case arises, has held that equitable tolling of the time limit for a motion to reopen is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." See *Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003). The Ninth Circuit has stated that in determining whether an alien exercised due diligence, it considers three issues: (1) if and when a reasonable person in the alien's position would suspect the specific fraud or error underlying his petition, (2) whether the alien took reasonable steps to investigate the suspected fraud or error or, if the alien was unaware of the error, to pursue relief, and (3) when the alien definitively learned of the harm resulting from counsel's deficiency. See *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (equitable tolling is available to a petitioner who is prevented from timely filing due to deception, fraud, or error, and who exercises due diligence in discovering such circumstances); *Singh v. INS*, 213 F.3d 1050, 1054 n. 8 (9th Cir. 2000) (counsel's statements in briefs are not evidence).

Even if the respondent has substantially satisfied the requirements set forth in *Matter of Lozada*, 19 I&N Dec 637 (BIA 1988), and established that he was the victim of ineffective assistance of counsel that may have affected the outcome of his proceedings, he has not sufficiently demonstrated that he exercised due diligence in discovering the deception, fraud, or error. According to the respondent's declaration, Attorney Snyder informed the respondent that

we had dismissed his appeal and that it was futile to take any further action. *See* Respondent's Motion, Tab A (paragraph 12). The respondent states that in 2002, he received a letter he did not understand. He took it to Attorney Snyder who said it could possibly help his case and he would take care of it. *See* Respondent's Motion, Tab A (paragraph 17). Yet, according to his statement, he did nothing further until 2010, when Attorney Snyder summoned the respondent to his office and informed him there was nothing further he could do. *See* Respondent's Motion, Tab A (paragraph 13). Given this period of time during which the respondent took no action, he cannot show that he took reasonable steps to investigate the fraud or error underlying his motion.

The respondent states that he went to various attorneys who told him there was nothing further to be done with his case. However, the respondent does not specify when or with whom he consulted. He states that when President Obama announced Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), an attorney reviewed his file and again told him there was nothing to be done. Again, he does not specify when or with whom he consulted. *See* Respondent's Motion, Tab A (paragraphs 14 and 15). The respondent does not explain when he met current counsel and when she informed him that he may have been the victim of ineffective assistance of counsel. The respondent has not provided sufficient information to establish that he acted with due diligence during the time between 1999 when we issued our prior order and 2016 when he filed the instant motion to reopen. *See Avagyan v. Holder, supra* at 679 (diligence involves whether a reasonable person "would suspect the specific fraud" and whether petitioner took "reasonable steps to investigate [any] suspected fraud").

The respondent also seeks reopening to apply for benefits under the settlement agreement in *Barahona-Gomez v. Ashcroft*, 243 F.Supp.2d 1029, 1034-36 (N.D.Cal. 2002). The respondent acknowledges that a motion to reopen seeking benefits under the *Barahona-Gomez* settlement agreement had to be filed by March 20, 2005.¹ *See Barahona-Gomez v. Ashcroft, supra*, at 1036; 68 Fed. Reg. 13727 (Mar. 20, 2003); 69 Fed. Reg. 63178 (Oct. 29, 2004). The respondent does not specifically argue that the March 20, 2005, deadline can or should be equitably tolled. *See* Respondent's Motion at 17-18. Furthermore, it is not clear that the respondent is a class member because he filed his Notice of Appeal with this Board on December 31, 1996. *See* Respondent's Motion at 18. Accordingly, we will deny the respondent's motion as untimely filed.

ORDER: The motion is denied.


FOR THE BOARD

¹ That lawsuit challenged actions which prohibited Immigration Judges and the Board from granting suspension of deportation during the period between February 13 and April 1, 1997. On April 1, 1997, section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took effect, and made individuals ineligible for suspension of deportation if they had not been continuously physically present in the United States for a period of seven years at the time that they were served with an Order to Show Cause.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Philadelphia, PA

Date: OCT - 8 2015

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATIONS: Reopening; remand

This case was last before us on September 29, 2000, when we entered a final administrative order dismissing the respondent's appeal. On June 29, 2015, the respondent submitted the instant motion to reopen and remand pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security (DHS) has not responded to the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent, a native and citizen of China, applied for (b) (6). The Immigration Judge found that he was not credible. The respondent seeks to have his deportation proceedings reopened to apply for (b) (6) based on (b) (6) in China, his marriage and (b) (6) in the United States, and a claim of (b) (6) in China.

He offers his (b) (6) application, statement, birth certificate, and marriage certificate, and his children's (b) (6). He also offers correspondence from his counsel, the Nationality Law of the People's Republic of China, the 1999 Chang Le City Family Planning Q&A Handbook, the Langqi Town Family Planning Q&A Handbook, the Ying Qian Town Family Planning Q&A Handbook, a 2003 Consular Information Sheet, a 2003 Administrative Decision of the Fujian Province Family Planning Administration, a 2005 Lianjiang County Guantou Township Committee Official Directive, Responses to Information Requests from the Immigration and Refugee Board of Canada, Responses from the Refugee Review Tribunal of

Australia, inquiries and responses from the Mei Hao Jia Yuan website, the Fuzhou Call Center for the Convenience of the People, and the Fujian Province Population and Family Planning Committee, documents that purport to be from the Changle City Population and Family Planning Leadership Group, the Chinese Communist Party Chang Le City Shou Zhan Township Committee, the Shou Zhan Township Population and Family Planning Leadership Group, the Jin Feng Township Population and Family Planning Leadership Group, the Family Planning Leading Group of Tantou Town, the Lian Jiang County Population and Family Planning Leadership Group, and the Fuzhou City Mawei District Tingjiang Town People's Government, reports and regulations from Quanzhou City Rural Area, Guhuai Town, Changle localities, Langqi Town, Cangshan District, Long Tian Township, Guantou Town, Xiuyu District, Xiang An, Guangze County, Zhangpu County, Nanyang Town, Sha County, and Ying Qian Town, responses to Freedom of Information Act (FOIA) requests and a FOIA appeal, portions of 2002 and 2004 State Department reports, a 2007 report of investigation by the U.S. Citizenship and Immigration Services, portions of the 1998, 2004, 2005, and 2007 Country Profiles on China, portions of the 1994, 1995, 2012, and 2013 Country Reports on China, portions of the 2009-2014 Annual Reports of the Congressional-Executive Commission on China (CECC), evidence submitted in unrelated (b) (6) cases, an affidavit and vita of Dr. (b) (6) of the Julius-Maximilians University in Germany, research articles, and media reports.

The respondent contends that his evidence shows "a drastic increase of (b) (6) throughout China, and more specifically in Fujian Province and Respondent's hometown." Motion at 7. He claims that there is the u (b) (6), that while (b) (6), there have been continuing reports of (b) (6) in some areas, and that the use of (b) (6). *Id.* at 2, 17-24, 44-46.

He reports that according to the (b) (6) in China, (b) (6). *See* Exhibit A, statement.¹ He contends that since he and his wife already have (b) (6), if he is removed to China at this time, he will be (b) (6). *Id.*

The instant case arises in the jurisdiction of the United States Court of Appeals for the Third Circuit, and we decline to apply the decisions that the respondent cites from outside of the Third Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to

¹ The respondent submits two groups of exhibits, both of which contain exhibits labeled A-F. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits.

reopen, and he has not established his prima facie eligibility for relief. *See Zheng v. Att'y Gen.*, 549 F.3d 260, 265 (3d Cir. 2008) (a motion to reopen (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

We find that the evidence regarding (b) (6) in China (b) (6) since the time of the respondent's hearing in 1997. The evidence reflects that (b) (6). *See, e.g.,* Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII; Exhibit BBBB at 26-27, 99-103; Exhibit CCCC at 18-19, 90-93; Exhibit DDDD at 22-23, 110-114; Exhibit EEEE at 54-57; Exhibit FFFF at 56-59; Exhibit HHHH at 28-29, 103-106. Moreover, the evidence indicates that (b) (6) in some areas of China have been a longstanding concern, including the time of the respondent's 1997 proceedings. *See, e.g.,* Exhibit SSS, § VII; Exhibit XXX, § VII. While some of the documents offered by the respondent announce (b) (6) that have been in place since the 1980s, they do not describe a significant change in the (b) (6). *See, e.g.,* Exhibit U (response to a 2008 inquiry from (b) (6) on the website of the Population and Procreation Planning Committee of Fujian Province); Exhibit MM-OO, Jin Feng Township Reports; Exhibits RR-TT, Tantou Town Notices. At most, these reports reflect that (b) (6) vary from locale to locale and fluctuate incrementally from time to time. *See e.g.,* Exhibit X, Quanzhou City Rural Area Report; Exhibit CC-FF, PP, and PPP, Changle City Population and Family Planning Bureau Notices and Announcements; Exhibit GG-II, Shou Zhan Township Committee Announcements; Exhibits KK-LL, Ying Qian Town Notices; Exhibits UU-WW, Langqi Town Reports; Exhibits AAA-DDD and FFF-HHH, Guantou Town Reports.

The respondent is from (b) (6). The documents regarding the (b) (6) in (b) (6) there, but rather a (b) (6) at the time of the respondent's proceedings in 1997. *See e.g.,* Exhibit ZZ; Exhibit EEE; *Zhu v. Att'y Gen.*, 744 F.3d 268 (3d Cir. 2014). The documents that relate to the enforcement of (b) (6) in the respondent's province, Fujian, include the Nationality Law of the People's Republic of China, the 2002 (b) (6), a (b) (6)

Commission, the 1998, 2004, 2005, and 2007 Country Profiles on China, the 1994, 1995, 2012, and 2013 Country Reports on China, and the 2009-2014 Annual Reports of the CECC. *See* Exhibit A, 2010 Annual Report of the CECC; Exhibit B, 2009 Annual Report of the CECC; Exhibit E, 2007 Country Profile; Exhibit M; Exhibits SSS – VVV; Exhibit XXX; Exhibits BBBB – FFFF; Exhibit HHH. We have found that U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *See Matter of H-L-H- & Z-Y-Z*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part, Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *see also Yu v. Att'y Gen. of U.S.*,

(b) (6)

513 F.3d 346, 349 (3d Cir. 2008) (State Department reports are persuasive); *Zubeda v. Ashcroft*, 333 F.3d 463, 478 (3d Cir. 2003) (country reports are the most appropriate and perhaps the best resource for information on political situations in foreign nations). These documents indicate that (b) (6)

(b) (6) in the respondent's locality and his province. *See, e.g.*, Exhibit E, 2007 Country Profile, Appendix B, Chapter 5, Incentives and Rewards.

Further, they reflect that rewards and incentives are provided to (b) (6), and that couples residing in the respondent's locality are subject to the longstanding (b) (6)

(b) (6). *See e.g.*, Exhibit A, 2010 Annual Report of the CECC at 23, 119 (citing instances of rewards given to (b) (6)

(b) (6)); Exhibit B, 2009 Annual Report of the CECC at 153-156 (citing instances of monetary rewards for (b) (6)

despite national law (b) (6)); Exhibit E, 2007 Country Profile, Appendix B; Exhibit WWW, attachment 4. They do not demonstrate a (b) (6)

(b) (6) since the time of the respondent's removal proceedings in 1997. We conclude that the evidence is not adequate to demonstrate (b) (6) in the (b) (6). *See* (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Zheng v. Att'y Gen., supra*. The evidence that there have been reports of (b) (6) in some areas of China contrary to the national policy is not sufficient to prima facie establish the likelihood that the respondent in this case will (b) (6) upon his return to China (b) (6) because the evidence does not indicate the likelihood of such (b) (6) in the United States. *See, e.g.*, Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII; Exhibit BBBB at 26-27, 99-103; Exhibit CCCC at 18-19, 90-93; Exhibit DDDD at 22-23, 110-114; Exhibit EEEE at 54-57; Exhibit FFFF at 56-59; Exhibit HHHH at 28-29, 103-106; *Zhu v. Att'y Gen., supra*.

We give limited weight to the documents that the respondent offers that were submitted in (b) (6) cases of persons from other areas of China who are not related to him because he has not shown that they are material to his claim nor demonstrated that the circumstances in those cases are the same as the circumstances in his case. *See* Exhibits QQQ, RRR, GGGG.

Dr. (b) (6)'s affidavit sets forth her opinion as to the authenticity of several of the respondent's foreign documents. *See* Exhibit JJ. However, her opinion speculates as to the credibility of the authors and the circumstances under which the documents were created, and we do not find it to be persuasive.

(b) (6)

The respondent has not demonstrated that he would be (b) (6). See (b) (6) (BIA 2007) (a showing of (b) (6), but a showing of (b) (6) does not amount to (b) (6) where the record contains scant information concerning the respondent's (b) (6) situation). He has not offered information to establish his (b) (6) nor adequate evidence to demonstrate that he would (b) (6) in China. See (b) (6) (3d Cir. 2005).

Further, the respondent has not made a prima facie showing that (b) (6) upon his return because his evidence does not indicate a (b) (6). See (b) (6).

We conclude that the respondent has not met the requirements of 8 C.F.R. § 1003.2(c)(3)(ii). His evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6) (BIA 2006). He has not satisfied his burden to demonstrate that his deportation proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the respondent's motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

FEB 16 2016

In re: (b) (6)

IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Theodore N. Cox, Esquire

APPLICATION: Reopening

This matter was most recently before the Board on November 14, 2003, when we denied the applicant's untimely motion to reopen his exclusion proceedings. The final administrative order was entered by the Immigration Judge on September 15, 1995, when he ordered the applicant excluded in absentia. This motion, submitted on October 22, 2015, is untimely and number barred. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security has not responded to this motion. The motion will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) in the country of nationality or the country to which exclusion or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the applicant has not demonstrated that the exception applies to this motion.

The applicant is a native and citizen of China. He was ordered to be removed in proceedings conducted in absentia in 1995. He previously sought reopening to apply for (b) (6) in China and (b) (6) in the United States. He again seeks reopening to apply for relief on this basis. He contends that his evidence shows "a drastic (b) (6) throughout China, and more specifically in (b) (6) and Applicant's hometown." Motion at 9.

He offers his (b) (6) application and statement, he and his wife's notarial birth certificates, his marriage certificate, (b) (6)

(b) (6)

(b) (6)

(b) (6), documents from the Library of Congress, the opinion and vita of (b) (6) of Columbia University, the opinion and vita of (b) (6) of the Julius-Maximilians University in Germany, a research article, and media reports.

The applicant reports that according to the (b) (6) in China, a couple (b) (6). See Exhibit A.¹ He claims that since he (b) (6), if he is removed to China at this time, he will (b) (6).

Id.

He contends that (b) (6) due to (b) (6). See Motion at 9. He asserts that there is the use of (b) (6) set by (b) (6) to (b) (6), there have been continuing reports of (b) (6) in some areas, and that (b) (6) by China renders its (b) (6). *Id.* at 9-11.

The instant case arises in the jurisdiction of the United States Court of Appeals for the Second Circuit, and we decline to apply the decisions that the applicant cites from outside of the Second Circuit. We will deny the applicant's motion because he has not demonstrated materially (b) (6) in China to warrant an exception to the time and number limitations for motions to reopen, and he has not established prima facie eligibility for relief. See *Matter of S-Y-G-*, *supra* (a motion to reopen based on changed country conditions must also demonstrate that the applicant is prima facie eligible for the requested relief).

The evidence regarding (b) (6) is not sufficient to demonstrate a material change since the time of the applicant's hearing in 1995. The evidence reflects that (b) (6). See, e.g., Exhibit A, 2009 (b) (6) (BIA 2010), *rev'd in part*, (b) (6) (2d Cir. 2012) (U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations). Moreover, the evidence indicates that (b) (6).

¹ The applicant submits two groups of exhibits, both of which contain exhibits labeled A-G. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits.

(b) (6)

(b) (6) of China have been a (b) (6), including the time of the applicant's hearing in 1995. *See, e.g.,* Exhibit A, 2009 Annual Report of the CECC at 151; Exhibit D, § IV; Exhibit AA at 18, 90. We conclude that the evidence is not sufficient to demonstrate (b) (6) in China in (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Shao v. Mukasey, supra.* The evidence reflects that China (b) (6) in another country as a Chinese national, and that there have been reports of (b) (6) in some areas of China, contrary to the (b) (6). *See, e.g.,* Exhibit A, 2009 Annual Report of the CECC at 151-157; Exhibit D, § IV; Exhibit AA at 18-19, 90-93. However, we find that it is not sufficient to *prima facie* establish the likelihood that this applicant will (b) (6) upon his return to China (b) (6) in the United States because the evidence he offers does not indicate the (b) (6). *See* (b) (6).

The applicant is from (b) (6). He has not shown that the documents and regulations from other cities and counties are applicable to him.

(b) (6)'s opinion sets forth her critique of the 2007 U.S. State Department Profile on China and supporting documents. *See* Exhibit B. However, her opinion is not based on personal knowledge, and it speculates regarding suspect motivations of the State Department and the validity of the sources on which the State Department relies. *Id.* We do not find it to be persuasive.

The opinion of (b) (6) regarding the enforcement of the (b) (6) does not convince us that reopening is warranted in the applicant's case. *See* Exhibit G, (b) (6) statement dated October 1, 2015. He states that "China's (b) (6) and its enforcement continues to vary across space and time." *Id.*, ¶ 6. This statement does not indicate that there has been a (b) (6) in China. Professor (b) (6) does not identify the documents or evidence that he consulted for his "own research" on the (b) (6), other than pages 103-104 of the 2014 Annual Report of the CECC and unnamed "recent online reports" of (b) (6). *Id.*, ¶¶ 7-8. His opinion regarding the enforcement of the (b) (6) China does not cite (b) (6) based on (b) (6) in the United States. Therefore, we are unable to accord weight to his opinion that the applicant and his wife are (b) (6). *Id.*, ¶¶ 7-8.

The applicant has not demonstrated that he would be subjected to (b) (6). *See* (b) (6) (BIA 2007)(a showing of (b) (6) to (b) (6), but a showing of (b) (6) does not amount to (b) (6) where the record contains scant information concerning the applicant's (b) (6).

(b) (6)

He has not offered information to establish his (b) (6) nor adequate evidence to demonstrate that he (b) (6) in China.

He has not made a prima facie showing that (b) (6)

. See (b) (6)

We conclude that the applicant has not met the requirements of 8 C.F.R. § 1003.2(c)(3)(ii). His evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6) (2d Cir. 2005); (b) (6) (BIA 2006). He has not satisfied his burden to demonstrate that his exclusion proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The applicant's motion to reopen is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Guaynabo, PR

Date:

In re: (b) (6)

JAN - 7 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reconsideration

The respondent moves the Board pursuant to section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6), and 8 C.F.R. § 1003.2 to reconsider our decision dated October 15, 2015, which sustained the Department of Homeland Security's ("DHS") appeal as to the Immigration Judge's grant of adjustment of status, vacated the Immigration Judge's order dated April 29, 2014, to the extent that it granted such relief, and remanded the record for further proceedings. The record before us does not contain a response from the DHS. The motion will be denied, and the record will be remanded.

The respondent's motion to reconsider filed on November 2, 2015, is timely. We conclude that there are no material factual or legal errors in our October 15, 2015, decision. *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006).

The respondent asserts that the Board erred in not interpreting and applying section 204(l) of the Act, 8 U.S.C. § 1154(l) [surviving relative consideration for certain petitions and applications], and 8 C.F.R. § 205.1(a)(3)(i)(C) [automatic revocation of immediate relative petitions]. However, we stated in our October 15, 2015, decision that assuming without deciding that the Immigration Judge correctly interpreted and applied section 204(l) of the Act and 8 C.F.R. § 205.1(a)(3)(i)(C), we would deny the claim on discretionary grounds. The respondent contends that if we had correctly applied section 204(l) of the Act and 8 C.F.R. § 205.1(a)(3)(i)(C), that her case would have been decided on the facts which existed at the time her U.S. citizen spouse died, (b) (6), 1997 (Exhs. 2-G, 2-J). The time period is important because her marriage fraud occurred after this time (Exh. 7). However, an adjustment of status application is adjudicated under the facts as they exist at the time of adjudication. We conclude that there was no error in considering her marriage fraud.

The respondent argues that she was never charged with fraud or willful misrepresentation of a material fact as a ground of inadmissibility. However, marriage fraud can still be considered in the exercise of discretion on an adjustment application even though no fraud inadmissibility charge has been made. The respondent contends that because no fraud inadmissibility charge was made, she had no opportunity to defend or present evidence on this issue. We disagree. The DHS's evidence was in the record as Exhibit 7. The respondent could have presented witnesses or documentary evidence on the marriage fraud issue. She did not present any persuasive evidence to rebut the DHS's evidence.

The respondent also asserts that the fraudulent marriage occurred more than 10 years ago, and thus should not weigh heavily in the exercise of discretion on her adjustment application. However, we are not concerned with a 10-year period for good moral character in an adjustment of status case. We are concerned with the exercise of discretion on the respondent's adjustment of status application. The court in *Mahmoud v. Gonzales*, 485 F.3d 175, 177-78 (1st Cir. 2007), stated that because of perceived abuses, Congress by statute and the Attorney General by regulation have sought to prevent applicants from using marriages to U.S. citizens as a means of frustrating removal proceedings. We conclude that there are no material factual or legal errors in our October 15, 2015, decision which held that the respondent was not deserving of adjustment of status in the exercise of discretion. Section 240(c)(4)(A)(ii) of the Act; 8 C.F.R. § 1240.8(d); *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970).

Accordingly, the following orders will be entered.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with our October 15, 2015, decision, and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: SEP 24 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Judith L. Wood, Esquire

APPLICATION: Reopening

The respondent's motion to reopen is untimely and will be denied. The Board's final administrative order was entered in these proceedings on November 4, 2014, when we dismissed the respondent's appeal. A motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision, and only one may be filed. Sections 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) & (C)(i); 8 C.F.R. § 1003.2(c)(2). The present motion was filed on July 2, 2015, almost 8 months after the Board's decision. The Department of Homeland Security ("DHS") has not responded to the current motion. The motion will be denied.

The respondent seeks reopening to re-apply for (b) (6) however, a motion to reopen to seek (b) (6) does not fall within the statutory or regulatory exceptions to the time limitation for motions before the Board. See section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3). Even assuming the respondent's untimely motion to reopen for (b) (6) may be considered under the exception for (b) (6) in the country of nationality, the respondent has not demonstrated that the exception applies to this motion.

The respondent has not demonstrated a (b) (6) material to his claim for relief, such that he (b) (6). The evidence reflects ongoing and substantially similar conditions of (b) (6) that existed at the time of the respondent's hearing (*Compare Motion*, tabs C, D with Exhs. 2, tab B; 5, tab B; 9). Nor has the respondent alleged (b) (6). Thus, the respondent has not established a (b) (6) in Ethiopia or prima facie eligibility for (b) (6) (1988); (b) (6) (BIA 1992).

Further, a motion to reopen is not an opportunity to repeat previously considered and rejected arguments. See *INS v. Wang*, 450 U.S. 139, 141 (1981) (discussing motions to reopen); *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). Therefore, we decline to revisit the respondent's arguments regarding the Immigration Judge's denial of his initial (b) (6) claim.

Nor has the respondent demonstrated exceptional circumstances to warrant the exercise of our discretion to reopen proceedings sua sponte. 8 C.F.R. § 1003.2(a); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, consisting of a stylized 'M' followed by a series of loops and a horizontal stroke.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: MAY 16 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elsa I. Martinez, Esquire

APPLICATION: Reopening

On February 16, 2016, the respondent, a native and citizen of Mexico, filed a motion to reopen to afford him the opportunity to apply for suspension of deportation under former section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254a. The motion will be denied as untimely filed.

The respondent seeks reopening under section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2) to afford him the opportunity to apply for suspension of deportation. The Board last entered an order in this case in 1999, when we dismissed the respondent's appeal from an Immigration Judge's 1996 decision denying his motion to reopen. He asks that the 90-day motion time limit be equitably tolled based on his claim of ineffective assistance of counsel.

The United States Court of Appeals for the Ninth Circuit, the jurisdiction wherein the respondent's case arises, has held that equitable tolling of the time limit for a motion to reopen is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." See *Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003). The Ninth Circuit has stated that in determining whether an alien exercised due diligence, it considers three issues: (1) if and when a reasonable person in the alien's position would suspect the specific fraud or error underlying his petition, (2) whether the alien took reasonable steps to investigate the suspected fraud or error or, if the alien was unaware of the error, to pursue relief, and (3) when the alien definitively learned of the harm resulting from counsel's deficiency. See *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (equitable tolling is available to a petitioner who is prevented from timely filing due to deception, fraud, or error, and who exercises due diligence in discovering such circumstances); *Singh v. INS*, 213 F.3d 1050, 1054 n. 8 (9th Cir. 2000) (counsel's statements in briefs are not evidence).

Even if the respondent has substantially satisfied the requirements set forth in *Matter of Lozada*, 19 I&N Dec 637 (BIA 1988), and established that he was the victim of ineffective assistance of counsel that may have affected the outcome of his proceedings, he has not sufficiently demonstrated that he exercised due diligence in discovering the deception, fraud, or error. According to the respondent's declaration, Attorney Snyder informed the respondent that

we had dismissed his appeal and that it was futile to take any further action. *See* Respondent's Motion, Tab A (paragraph 12). The respondent states that in 2002, he received a letter he did not understand. He took it to Attorney Snyder who said it could possibly help his case and he would take care of it. *See* Respondent's Motion, Tab A (paragraph 17). Yet, according to his statement, he did nothing further until 2010, when Attorney Snyder summoned the respondent to his office and informed him there was nothing further he could do. *See* Respondent's Motion, Tab A (paragraph 13). Given this period of time during which the respondent took no action, he cannot show that he took reasonable steps to investigate the fraud or error underlying his motion.

The respondent states that he went to various attorneys who told him there was nothing further to be done with his case. However, the respondent does not specify when or with whom he consulted. He states that when President Obama announced Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), an attorney reviewed his file and again told him there was nothing to be done. Again, he does not specify when or with whom he consulted. *See* Respondent's Motion, Tab A (paragraphs 14 and 15). The respondent does not explain when he met current counsel and when she informed him that he may have been the victim of ineffective assistance of counsel. The respondent has not provided sufficient information to establish that he acted with due diligence during the time between 1999 when we issued our prior order and 2016 when he filed the instant motion to reopen. *See Avagyan v. Holder, supra* at 679 (diligence involves whether a reasonable person "would suspect the specific fraud" and whether petitioner took "reasonable steps to investigate [any] suspected fraud").

The respondent also seeks reopening to apply for benefits under the settlement agreement in *Barahona-Gomez v. Ashcroft*, 243 F.Supp.2d 1029, 1034-36 (N.D.Cal. 2002). The respondent acknowledges that a motion to reopen seeking benefits under the *Barahona-Gomez* settlement agreement had to be filed by March 20, 2005.¹ *See Barahona-Gomez v. Ashcroft, supra*, at 1036; 68 Fed. Reg. 13727 (Mar. 20, 2003); 69 Fed. Reg. 63178 (Oct. 29, 2004). The respondent does not specifically argue that the March 20, 2005, deadline can or should be equitably tolled. *See* Respondent's Motion at 17-18. Furthermore, it is not clear that the respondent is a class member because he filed his Notice of Appeal with this Board on December 31, 1996. *See* Respondent's Motion at 18. Accordingly, we will deny the respondent's motion as untimely filed.

ORDER: The motion is denied.


FOR THE BOARD

¹ That lawsuit challenged actions which prohibited Immigration Judges and the Board from granting suspension of deportation during the period between February 13 and April 1, 1997. On April 1, 1997, section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took effect, and made individuals ineligible for suspension of deportation if they had not been continuously physically present in the United States for a period of seven years at the time that they were served with an Order to Show Cause.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: (b) (6) – Los Angeles, CA
(b) (6)

Date:

SEP - 2 2015

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Arthur Campbell Cooke, Esquire

APPLICATION: Reinstatement of proceedings; remand

ORDER:

In a decision dated March 21, 2000, this Board ordered the proceedings administratively closed to provide the respondents an opportunity to have their proceedings repapered and placed into removal proceedings to enable them to apply for cancellation of removal under section 309(c)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). The respondents, the recipients of approved I-130 visa petitions, have now filed a motion requesting that the proceedings be reinstated and remanded to allow them to have their adjustment applications adjudicated before the Immigration Court. The opposing party has not filed an opposition to the request, and thus it is deemed unopposed. 8 C.F.R. § 1003.2(g)(3). Accordingly, the motion is granted, the Board's March 21, 2000, order is vacated, proceedings are reinstated, and the record is remanded for further proceedings.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Hartford, CT

Date: FEB 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Judith B. Sporn, Esquire

APPLICATION: Reopening

The Board entered the last order of removal in this case on August 1, 2013, and the respondent filed the instant motion to reopen the proceedings on December 17, 2015. The motion is untimely and will be denied. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(c)(i); 8 C.F.R. § 1003.2(c)(2).

On November 15, 2000, an Immigration Judge found the respondent removable as charged, pretermitted his application for (b) (6) as untimely, denied the application for (b) (6), and ordered his removal to Turkey. The Immigration Judge found that the respondent's (b) (6) claims lacked credibility. The respondent appealed, and on May 21, 2002, we granted a motion to remand to allow the respondent to apply for adjustment of status. That application was ultimately withdrawn, and in an order dated September 14, 2011, the Immigration Judge administratively returned the case to the Board for adjudication of the respondent's appeal of the denial of (b) (6) and related relief. On August 1, 2013, the Board dismissed the respondent's pro se appeal as moot and abandoned because efforts to contact him were unsuccessful, and we did not have an address to which mail could effectively be sent. The respondent neither sought reconsideration of the Board's August 1, 2013, decision nor reinstatement of the appeal.

In the instant motion, the respondent seeks reopening based on a claim of (b) (6) in Turkey to reapply for (b) (6). See section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). In his statement offered with the motion, the respondent states that "(his) initial (b) (6) application was based on (b) (6) in Turkey who was (b) (6) but had never actually been one," and because he was (b) (6).

The motion is accompanied by media articles regarding recent (b) (6) (b) (6). The respondent, however, has offered no arguments or evidence to address or rebut the Immigration Judge's adverse credibility determination.

To qualify for reopening for (b) (6), an alien bears the heavy burden to proffer material evidence that not only reflects (b) (6) in the country of nationality, but evidence that also supports a prima facie case for a grant of (b) (6). See (b) (6) (BIA 2007). Inasmuch as the respondent's underlying (b) (6) claim was found to lack veracity, and he has not addressed this issue in his motion, he cannot satisfy this heavy burden.

See (b) (6) (BIA 1995) ("A (b) (6) claim which lacks veracity cannot satisfy the burden of proof and persuasion necessary to demonstrate eligibility for (b) (6) relief"). Therefore, reopening these proceedings to enable the respondent to reapply for (b) (6) and related relief is not warranted.

Further, the respondent's motion does not demonstrate that any exception to the filing deadline applies to this motion, or that an exceptional situation is present in this case to warrant the exercise of the Board's limited sua sponte authority. See *Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. §§ 1003.2(a), (c)(3). Accordingly, the respondent's untimely motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

Files: (b) (6) – Detroit, MI

Date: MAR 30 2015

(b) (6)

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: George P. Mann, Esquire

ON BEHALF OF DHS: Jonathan Goulding
Senior Attorney

APPLICATION: Reconsideration; reopening

This case was last before the Board on October 26, 2015, when the Board dismissed the respondents' appeal. The respondents now timely request that the Board both reconsider that decision and reopen these removal proceedings. The respondents' motion will be denied.¹

To the extent the pending motion rests on previously raised issues relating to the respondents' asserted eligibility for (b) (6), the motion does not identify any issue that was not considered in the Board's October 26, 2015, decision nor does it identify any error of fact or law based on the record then before the Board. See 8 C.F.R. § 1003.2(b); see also *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) (discussing the requirements for motions to reconsider). The respondents' contentions in the present motion do not persuade us that our prior decision in this case overlooked or erroneously decided any previously advanced arguments. The respondents' asserted disagreement with or disapproval of the outcome of the Board's October 26, 2015, decision alone is not sufficient to demonstrate either that the Board improperly evaluated or disregarded the facts and evidence presented or committed legal error. The respondents' motion to reconsider is therefore denied.

Similarly, the respondents' motion to reopen is denied. The evidence proffered along with the pending motion has not been shown to satisfy the requirements for reopening these removal proceedings. See 8 C.F.R. § 1003.2(c)(1); see also *Matter of Coelho*, 20 I&N Dec. 464, 272-

¹ Likewise, their requests for both oral argument and en banc review are denied. See 8 C.F.R. § 1003.1 (a)(5), (e)(7).

72^f(BIA 1992) (explaining that a party who seeks a remand or to reopen proceedings to pursue relief bears a "heavy burden" of proving that if proceedings before the Immigration Judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case). Notwithstanding the relatively current country information proffered along with the motion, such evidence is largely cumulative of the evidence previously considered by both the Immigration Judge and the Board in addressing the respondents' asserted eligibility for relief.

Further, while the proffered country information may reflect (b) (6) between Rwanda and other countries, including France, such evidence, which describes conditions generally, has not sufficiently been shown to relate to the respondents or their (b) (6) that is sufficient to satisfy the materiality requirement of (b) (6). (b) (6) in a country are not usually sufficient to establish (b) (6) case.

Moreover, the submitted evidence does not sufficiently reflect that there exists a reasonable possibility that the respondents would be (b) (6) on (b) (6) for the United States government, the respondents' eth (b) (6). Nor does such evidence sufficiently demonstrate that the respondents would (b) (6) in Rwanda. See (b) (6). The evidence presented does not make a prima facie showing that the respondents would (b) (6), as that term is defined by regulation.

Finally, to the extent the respondents assert that the hardship they may face combined with their length of residence in the United States and the equities they have accrued while living in this country warrants reopening of the proceedings sua sponte, on this record, we do not find such action warranted.² See, e.g., *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). We acknowledge the challenges the respondents may face as well as their accomplishments in this country, but there appears to be no relief available to the respondents and no basis for reopening, given the present record and the evidence submitted in support of the motion.

On this record, the respondents have not sufficiently shown that further hearings on their asserted eligibility for relief are warranted. Accordingly, we will enter the following order.

ORDER: The respondents' motion is denied.



FOR THE BOARD

² We note that a request for a favorable exercise of prosecutorial discretion or for deferred action or humanitarian parole would have to be addressed to the Department of Homeland Security.

Falls Church, Virginia 22041

File: (b) (6) - Las Vegas, NV

Date:

FEB 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jasmine C. Coca, Esquire

APPLICATION: Reopening

On November 19, 2013, the Board dismissed the respondent's appeal from the Immigration Judge's November 27, 2012, decision denying his application for cancellation of removal for certain nonpermanent residents. On December 16, 2015, the respondent filed the instant motion to reopen. The motion to reopen is untimely and will be denied. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2).

The respondent, a native and citizen of El Salvador, seeks reopening to apply for (b) (6). The filing deadline imposed on motions to reopen does not apply to motions to reapply or apply for (b) (6) and related relief based on (b) (6) in the alien's country of nationality or the country to which the alien's removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The alien, however, bears the "heavy burden" to show that the proffered evidence is material, reflects (b) (6) in the country of nationality, and supports a prima facie case for a grant of (b) (6). (b) (6) (BIA 2007). The respondent has not met this "heavy burden."

The respondent claims to (b) (6) in El Salvador (b) (6). *See* Motion to Reopen at 9. *See also* (b) (6) (BIA 2014). Specifically, the respondent claims to (b) (6)

Id. In support of the motion, the respondent has offered evidence that his relative was (b) (6) in El Salvador in 2013. *Id.* He has also offered the 2014 U.S. Department of State Country Report on Human Rights Practices for El Salvador, as well as two media articles relating to recent (b) (6), in El Salvador.

Initially, we find that the respondent's evidence does not show that the respondent's (b) (6) to qualify as (b) (6) for immigration purposes. *See* (b) (6) (9th Cir. 2014) (explaining that to establish (b) (6) there must be evidence showing that (b) (6))

(b) (6)

(b) (6); (b) (6) (9th Cir. 2005) (stating that a (b) (6) and that major segments of (b) (6), abrogated on other grounds by (b) (6) (9th Cir. 2013); (b) (6) (BIA 2014) ("To be (b) (6)"); (b) (6) (observing that in evaluating a (b) (6), it may be necessary to take into account (b) (6) of the alien's country of citizenship or nationality). In this regard, we note that the evidence offered in support of the motion does not include evidence pertaining to the (b) (6).

While the evidence shows that there has been a recent (b) (6) in El Salvador, it does not reflect (b) (6) in that country since the respondent's removal hearing. *See Matter of S-Y-G-*, *supra*. Further, while we regret (b) (6) the respondent's relative, it has not been shown that she was (b) (6). Finally, the evidence does not show that the respondent (b) (6). *See* (b) (6).

In sum, reopening the proceedings under section 240(c)(7)(C)(ii) of the Act is not warranted in this case. Further, it does not appear that any other exception to the filing deadline applies to this motion or that an exceptional situation is present in this case to warrant the exercise of the Board's limited sua sponte authority. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. §§ 1003.2(a), (c)(3). Accordingly, the respondent's untimely motion to reopen will be denied. The respondent's request for a stay of removal is also denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: (b) (6) – New York, NY
(b) (6)

Date: FEB 24 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Barry C. Schneps, Esquire

APPLICATION: Reopening

This case was last before us on May 15, 2015, when we denied the respondents' prior motion to reopen their in absentia removal proceedings. On December 28, 2015, the respondents submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion exceeds both the time and number limitations for motions to reopen, and it will be denied.

An alien may file only one motion to reopen and, with certain exceptions, it shall be filed within 90 days of the date of entry of a final administrative order. *See* 8 C.F.R. § 1003.2(c)(2); section 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A) and (C)(i). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6)

(b) (6) in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondents have not demonstrated that the exception applies to this motion.

The respondents are husband and wife, natives and citizens of China. They failed to appear for their hearing on August 12, 1999, and were ordered to be removed in proceedings conducted in absentia. They previously sought reopening based on a claim of ineffective assistance of counsel, and to apply for (b) (6)

(b) (6) in China, the female respondent's (b) (6) in the United States, and a (b) (6). They again seek to have their proceedings reopened based on the female respondent's (b) (6) in China.

(b) (6)

They offer the female respondent's affidavit and (b) (6), letters and identity cards from a friend and a relative in China, media reports, and an affirmation from their attorney.

The female respondent states that her (b) (6). See Exhibit A. She reports that her uncle and her friend were (b) (6) in China (b) (6), and (b) (6) her return. *Id.*

We will deny the motion because the respondents have not demonstrated materially (b) (6) in China to warrant an exception to the time and number limitations for motions to reopen, and have not established their prima facie eligibility for relief. See (b) (6) (a motion to reopen based on (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

To the extent that the respondents are claiming a (b) (6) in China with regard to (b) (6) in the United States, they have presented insufficient evidence of such a change. The media reports they offer indicate that (b) (6) in China have (b) (6) in China. See Exhibit B at 4-7, 9-11. The evidence does not indicate (b) (6) China in (b) (6) in the United States. *Id.* The respondents have not shown a (b) (6) in China since their 1999 hearing.

We give little weight to the letters from the respondents' friend and relative in China who claim that (b) (6) the female respondent was intercepted. See Exhibit B at 14, 18. Their claims are not supported by evidence such (b) (6), statements of others present, or evidence that the respondent (b) (6). *Id.* Moreover, these statements appear to be created for the purpose of litigation and are from interested witnesses who are not subject to cross-examination. They are of essentially unknown reliability, and we do not find them to have been shown to be of sufficient evidentiary worth to support reopening these proceedings. See *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); generally *Qui Wen Zheng v. Gonzales*, 500 F.3d 143, 146-47 (2d Cir. 2007).

The burden of proof in a motion to reopen is on the alien to establish eligibility for the requested relief. See *Shao v. Mukasey*, *supra*. We find that the evidence is not sufficient to prima facie demonstrate that the respondents in this case are eligible for (b) (6) because their evidence is inadequate to meet their burden to show that (b) (6). See (b) (6) (2d Cir. 2009) (alien's evidence must show that (b) (6) in the United States). We conclude that the respondents have not satisfied their burden of proof to prima facie establish (b) (6) in China

(b) (6)

(b) (6) because the evidence is not sufficient to demonstrate the (b) (6)

The respondents have not made a prima facie showing that (b) (6)

. See (b) (6)

We conclude that the respondents have not met the requirements of section 240(c)(7)(C)(ii) of the Act. Their evidence is not sufficient to establish a (b) (6)

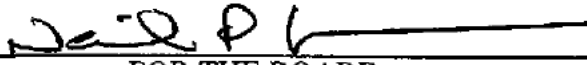
"arising in the country of nationality" so as to create an exception to the time and number limitations for filing another late motion to reopen to apply for (b) (6). See (b) (6)

(2d Cir. 2005); (b) (6)

(BIA 2006); (b) (6)

The respondents have not met their burden of proving that their in absentia removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the respondents' motion exceeds both the time and number limitations for motions to reopen, it will be denied.

ORDER: The respondents' motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

NOV 23 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATIONS: Reopening; remand

This case was last before us on June 26, 2014, when we entered a final administrative order dismissing the respondent's appeal from the Immigration Judge's denial of his motion to reopen his in absentia removal proceedings. On September 11, 2015, the respondent submitted the instant motion to reopen and remand pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. He was ordered to be removed in proceedings conducted in absentia in 2000. He previously sought reopening to apply for (b) (6)

(b) (6) in China, and a claim of ineffective assistance of counsel. He now seeks reopening to apply for (b) (6)

(b) (6) in China, his marriage (b) (6) in the United States, (b) (6)

(b) (6) in China. He contends that his evidence shows the (b) (6), and "a drastic (b) (6)

(b) (6) throughout China, and more specifically in Zhejiang Province and Respondent's hometown." Motion at 9, 27.

He states that according to the (b) (6) in China, (b) (6) China's (b) (6). See Exhibit A, statement at 1.¹ He reports that he (b) (6), and he is (b) (6) in China. *Id.* The respondent states that (b) (6). *Id.* He relates that the (b) (6) in his hometown (b) (6), even those (b) (6). *Id.* He declares that if he were returned to China, he would have to (b) (6). *Id.* at 2. He claims that he will (b) (6). *Id.*

The respondent argues that "a (b) (6) exists in China which did not exist at the time of the original hearing – particularly in Zhejiang Province." See Motion at 26. He contends that the evidence reflects a (b) (6) specifically in Respondent's home locality of Zhejiang Province (b) (6). *Id.* at 2, 15, 19, 23. He asserts that the evidence establishes (b) (6) in China with respect to (b) (6) since his hearing in 2000, specifically in Zhejiang province and his hometown. *Id.* at 27. He argues that there is "the (b) (6) in China's (b) (6)" that "while (b) (6), there have been continuing (b) (6) in some areas," and that "the use of (b) (6) by China renders its (b) (6)." *Id.* at 31-33.

The respondent offers his (b) (6) application, statement, birth certificate, marriage certificate, and (b) (6), his wife's naturalization certificate, and his children's birth certificates.

He also offers correspondence from his counsel, the 2002 Zhejiang Province Rules and Regulations for Population and Family Planning, documents that purport to be from localities in Zhejiang Province, including Yongjia County, Wenzhou City, Lu Cheng District, Qi Dou Township, Longwan District, Haicheng Neighborhood, Qian Lu Township, Hong Dian Neighborhood, Tianhe Township, Liu Shi Township, Tai Shun County, Lin Shan Village, Rui An City, and Ou Bei Township, a portion of the 2004 congressional testimony of (b) (6), a portion of the 2014 congressional testimony of (b) (6), Responses from the (b) (6).

¹ The respondent submits three groups of exhibits, all of which contain exhibits labeled A-H, and two of which contain exhibits labeled A-BB. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits. As a result, our analysis necessarily involves lengthy lists identifying which of these documents we are addressing

Tribunal of Australia, a report on family planning laws in Fujian and Guangdong Provinces from the Immigration and (b) (6) Board of Canada, documents from the Library of Congress, a response to a Freedom of Information Act (FOIA) request, portions of 2002 and 2004 State Department reports, a portion of the 2007 Country Profile on China, portions of the 2009, and the 2012 through 2014 Annual Reports of the Congressional-Executive Commission on China (CECC), portions of the 2010 through 2013 and the 2015 International Religious Freedom (IRF) Reports, portions of the 2011 through 2014 Annual Reports of the U.S. Commission on International Religious Freedom (USCIRF), the opinion and vita of Professor (b) (6) of Columbia University, the opinion and vita of Dr. (b) (6) of the Julius-Maximilians University in Germany, research articles, media reports, and a 1997 decision of the United States Court of Appeals for the Seventh Circuit.

The instant case arises in the jurisdiction of the Second Circuit, and we decline to apply the decisions that the respondent offers and cites from outside of the Second Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he has not established his prima facie eligibility for relief. *See Matter of S-Y-G-*, *supra* (a motion to reopen based on changed country conditions must also demonstrate that the applicant is prima facie eligible for the requested relief).

We find that the evidence regarding (b) (6) in China is not sufficient to demonstrate a (b) (6) since the time of the respondent's hearing in 2000. The evidence reflects that China continues to (b) (6)

(b) (6). *See, e.g.,* Exhibit A, 2011 Annual Report of the USCIRF at 10, 20, 124-126, 128-130; Exhibit B, 2010 IRF Report at 1-14; Exhibit HHH, 2012 Annual Report of the USCIRF at 6-7, 13, 136-139, 143-148; Exhibit III, 2013 Annual Report of the USCIRF at 6, 16, 30-32, 35-40; Exhibit JJJ, 2014 Annual Report of the USCIRF at 47-49; Exhibit KKK, 2011 IRF Report at 1-14; Exhibit LLL, 2012 IRF Report at 1-17; Exhibit MMM, 2013 IRF Report at 1-17; Exhibit CCCC, 2009 Annual Report of the CECC at 132-140; Exhibit EEEE, 2013 Annual Report of the CECC at 21-22; Exhibit FFFF, 2012 Annual Report of the CECC at 14-15; Exhibit JJJJ, 2014 Annual Report of the CECC at 90-93, 95-99; Exhibit MMMM, 2015 Annual Report of the USCIRF at 33, 35-36. The evidence indicates that the (b) (6) by the Chinese (b) (6), including the time of the respondent's 2000 hearing. *Id.* We have found that U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). We conclude that the evidence is inadequate to show a (b) (6) in China with respect to the (b) (6).

The burden of proof for a motion to reopen is on the alien to establish eligibility for the requested relief. *See Shao v. Mukasey*, *supra*. We find that reports of the (b) (6) are not sufficient to prima facie demonstrate that the respondent in this case has (b) (6) upon his return to China based on his (b) (6).

(b) (6)

(b) (6) there because the evidence does not indicate that he will (b) (6). See, e.g., Exhibit A, 2011 Annual Report of the USCIRF at 10, 20, 124-126, 128-130; Exhibit B, 2010 IRF Report at 1-14; Exhibit HHH, 2012 Annual Report of the USCIRF at 6-7, 13, 136-139, 143-148; Exhibit III, 2013 Annual Report of the USCIRF at 6, 16, 30-32, 35-40; Exhibit JJJ, 2014 Annual Report of the USCIRF at 47-49; Exhibit KKK, 2011 IRF Report at 1-14; Exhibit LLL, 2012 IRF Report at 1-17; Exhibit MMM, 2013 IRF Report at 1-17; Exhibit CCCC, 2009 Annual Report of the CECC at 132-140; Exhibit EEEE, 2013 Annual Report of the CECC at 21-22; Exhibit FFFF, 2012 Annual Report of the CECC at 14-15; Exhibit JJJJ, 2014 Annual Report of the CECC at 90-93, 95-99; Exhibit MMMM, 2015 Annual Report of the USCIRF at 33, 35-36. We conclude that the respondent has not satisfied his burden of proof to prima facie establish the (b) (6) in China on (b) (6) because the evidence is not sufficient to demonstrate that he will (b) (6) upon his return (b) (6). See (b) (6) (2d Cir. 2008); (b) (6) (2d Cir. 2005).

Regarding the respondent's claim based on the (b) (6) in China, we find that the evidence regarding past and current conditions in China (b) (6) since the time of the respondent's hearing in 2000. The evidence reflects that (b) (6), and other (b) (6). See, e.g., Exhibit A, 2009 Annual Report of the CECC at 151-157; Exhibit D, 2007 Country Profile, § IV; Exhibit AA, 2012 Annual Report of the CECC at 18-19, 90-93. Moreover, the evidence indicates that (b) (6) in some areas of China have been a (b) (6), including the time of the respondent's hearing in 2000. See, e.g., Exhibit A, 2009 Annual Report of the CECC at 151; Exhibit D, 2007 Country Profile, § IV; Exhibit AA, 2012 Annual Report of the CECC at 18, 90.

While some of the documents offered by the respondent announce renewed efforts to (b) (6) that have been in place since the 1980s, they do not describe a significant (b) (6) laws. See, e.g., Exhibit N, 2002 Zhejiang Province Rules and Regulations for Population and Family Planning; Exhibit S, 2008 Report on Family Planning Competition Basics in Wenzhou City Lu Cheng District Hong Dian Neighborhood; Exhibit X, 2010 Notice to Launch a Service Month in the Spring for the Implementation of Population and Family Planning in Oubei Town, Yongjia County. At most, these reports reflect that (b) (6) vary from locale to locale and fluctuate incrementally from time to time. *Id.* We conclude that the evidence is not sufficient to demonstrate (b) (6) in China in the (b) (6).

The respondent has not met his burden of proof to establish his prima facie eligibility for the requested relief based on his marriage and the birth of his children in the United States. See *Shao v. Mukasey, supra*. The evidence reflects that China regards a (b) (6), and that there have been reports of (b) (6) in some areas of China, contrary (b) (6). See, e.g., Exhibit A, 2009 Annual Report of the CECC at 151-157;

Exhibit D, 2007 Country Profile, § IV; Exhibit AA, 2012 Annual Report of the CECC at 18-19, 90-93. However, we find that it is not sufficient to prima facie establish the likelihood that this respondent will be (b) (6) upon his return to China (b) (6) in the United States because the evidence he offers does not indicate the likelihood that he (b) (6). See (b) (6).

The respondent is from (b) (6) Province. He has not shown that the documents and regulations from other towns and counties are applicable to him.

Dr. (b) (6)'s opinion sets forth her critique of the 2007 U.S. State Department Profile on China and supporting documents. See Exhibit B, (b) (6) opinion dated (b) (6) 2009. However, her opinion is not based on personal knowledge, and it speculates regarding suspect motivations of the State Department and the validity of the sources on which the State Department relies. *Id.* We do not find it to be persuasive.

The opinion of Professor (b) (6) regarding the (b) (6) in China and the (b) (6) does not convince us that reopening is warranted in the respondent's case. See Exhibit H, (b) (6) statement dated (b) (6) 2015. He states that "China's (b) (6) remains in effect and its enforcement continues to vary across space and time." *Id.*, ¶ 7. This statement does not indicate that there has been a (b) (6) in the (b) (6) in China. Professor (b) (6) does not identify the documents or evidence that he consulted for his "own research" on the (b) (6) in Zhejiang Province, including (b) (6), other than pages 103-104 of the 2014 Annual Report of the CECC and unnamed "recent online reports" of (b) (6). *Id.*, ¶¶ 7-8, 10. His opinion regarding the (b) (6) in China does not cite (b) (6) in the United States. Therefore, we are unable to accord weight to his opinion that the respondent and his wife are "(b) (6)." *Id.*, ¶¶ 10-11.

Moreover, Professor (b) (6) claims that "in the province of Zhejiang, the (b) (6), and that "the (b) (6) in particular, shows no sign of abating," citing page 96 of the 2014 Annual Report of the CECC, page 36 of the 2015 Annual Report of the USCIRF, and one media report on (b) (6) in Zhejiang. *Id.*, ¶ 9. In light of the other reports offered by the respondent regarding the (b) (6) in Zhejiang Province, we give limited weight to Professor (b) (6)'s opinion that there is a "very high likelihood" of the respondent's (b) (6) if he returns to China and (b) (6). *Id.*, ¶ 11.

The respondent has not demonstrated that he would be subjected to (b) (6). See (b) (6) (BIA 2007)(a showing of (b) (6) where the record contains scant information concerning the applicant's (b) (6)). He has not offered information to establish his (b) (6) nor adequate evidence to demonstrate that he would (b) (6) in China. See (b) (6).

(b) (6)

(b) (6) (2d Cir. 2014) (discussing the circumstances under which
(b) (6)).

The respondent has not made a prima facie showing that (b) (6)

(b) (6) upon his return because his evidence does not indicate a
(b) (6). See (b) (6).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. His evidence is not sufficient to establish a (b) (6)
"arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6)
(2d Cir. 2005); (b) (6) (BIA 2006); (b) (6). He has not satisfied his burden to demonstrate that his in absentia removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date:

MAR 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Reopening

This case was last before us on June 16, 2003, when we entered a final administrative order summarily dismissing the respondent's appeal. On November 24, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. He requests a stay of removal. The Department of Homeland Security has not responded to the motion. The motion has been filed out of time, and it will be denied. The respondent's stay request will also be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* (b) (6) (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. He applied for (b) (6). The Immigration Judge found that he was not credible. The respondent seeks reopening to apply for (b) (6) based on (b) (6) in China, his marriage and (b) (6) in the United States, and a claim of (b) (6) in China. He asserts that his evidence demonstrates that (b) (6) have increased in Respondent's region of China since his initial proceedings in 2002 (Motion at pages 2-3). He contends that reopening sua sponte is warranted.

He offers his (b) (6) application, affidavit, birth certificate, marriage certificate, his wife's social security card and (b) (6), his children's (b) (6), letter from his brother (b) (6), and a family photo.

(b) (6)

He also offers a portion of the 1982 Constitution of the People's Republic of China, the 2002 (b) (6) of the People's Republic of China, a portion of the 2005 Law of the People's Republic of China on Penalties for Administration of Public Security, a portion of the 2014 Country Report on China, a 2014 Report from the Immigration and (b) (6) Board of Canada, a 2014 Amnesty International Report, a portion of the 2015 Annual Report of the Congressional-Executive Commission on China (CECC), research articles, and media reports.

The respondent states that he is (b) (6) to China because of China's (b) (6)

(Motion at Respondent's Affidavit). He claims that although the Chinese (b) (6)

will be looser, he is (b) (6)

if he went back to China (*Id.*).

The instant case arises in the jurisdiction of the United States Court of Appeals for the First Circuit, and we decline to apply the decisions that the respondent cites from outside of the First Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he has not established his prima facie eligibility for relief. Specifically, the evidence he offers regarding (b) (6) in China is not sufficient to (b) (6) in China or (b) (6) since the time of his hearing in 2002.

Regarding the respondent's claim (b) (6) in China, we find that his evidence of (b) (6) in China (b) (6) is not sufficient to demonstrate (b) (6) since the time of his hearing in 2002. The evidence reflects that (b) (6) continue to be (b) (6). See, e.g., Motion at Exhibit 2(A) at 23-24; Exhibit 2(B) at 32, 34-38; Exhibit 3(A) at 125-129; Exhibit 4(A) at 143; Exhibit 5(A)-(I). It indicates that there have been modifications to the (b) (6) in China (b) (6) in China, and that the (b) (6) appears to be a (b) (6) in effect since before the respondent's hearing in 2000. See, e.g., Motion at Exhibit 2(B) at 32; Exhibit 3(A) at 125-129; Exhibit 4(A) at 143. The evidence is not adequate to demonstrate (b) (6) in China in (b) (6).

The respondent is from (b) (6), Fujian Province. His evidence does not suggest a (b) (6) in his locality. Rather, it reflects that (b) (6) in the Fujian Province in substantially the same manner since the time of the respondent's proceedings in 2000, and does not indicate that there has been (b) (6) in the respondent's home region. See, e.g., Exhibit 2(A) at 21-26; 2(B) at 32-40; Exhibit 2(C); Exhibit 3(A) at 123-131; Exhibit 4(A) at 143; Exhibit 5(A)-(I). We conclude that the respondent has not provided evidence that constitutes unambiguous corroboration of (b) (6) to warrant reopening (b) (6) or demonstrated that China's (b) (6) in his local area. See (b) (6)

(b) (6)

(b) (6) (1st Cir.2010). The evidence does not demonstrate (b) (6) in China.

The respondent has not met his burden to demonstrate that he is prima facie eligible for (b) (6) in China because his evidence does not indicate a likelihood of (b) (6) in the United States. The evidence reflects that (b) (6), although there have been some reports of (b) (6) in some areas of China contrary to the (b) (6). See, e.g., Motion at Exhibit 2(A) at 21-26; Exhibit 2(B) at 32-40; Exhibit 2(C); Exhibit 3(A) at 123-131; Exhibit 4(A) at 143; Exhibit 5(A)-(I). However, none of the reports describe instances where (b) (6) in the United States. *Id.*

The respondent has also proffered a letter from one (b) (6), his brother in China, indicating that one of his neighbors, (b) (6) (Motion, Exhibit 6(H)). However, this letter is unsworn, and its reliability, as well, is undermined by the fact that it was prepared for the purposes of litigation. See *Matter of H-L-H- & Z-Y-Z*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Moreover, (b) (6) is not similarly situated to the respondent, inasmuch as the (b) (6) occurred in China, not in the United States.

We conclude that the evidence is not adequate to prima facie establish the likelihood that the respondent will (b) (6) upon his return to China (b) (6) because the evidence does not indicate the (b) (6) in the United States. See (b) (6) (1st. Cir. 2012) (quoting (b) (6) (1st Cir. 2009)).

The respondent has not made a prima facie showing that (b) (6) upon his return because his evidence does not indicate a (b) (6). See (b) (6).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. His evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time limit for filing a late motion to reopen to apply for (b) (6). See (b) (6) (BIA 2006); (b) (6). He has not met his burden of proving that his removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find that an exercise of our sua sponte authority to reopen is not warranted. See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Accordingly, as the respondent's motion exceeds the time limit for motions to reopen, it will be denied, and his request for a stay of removal will also be denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of removal is denied as moot.

A handwritten signature in black ink, appearing to be 'M' followed by a long horizontal stroke.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Florence, AZ

Date:

FEB 23 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gabriel G. Leyba, Esquire

ON BEHALF OF DHS: Kimberly Shepherd
Deputy Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] -
Controlled substance trafficker

APPLICATION: Termination

The Department of Homeland Security ("DHS") timely appeals the Immigration Judge's September 4, 2015, decision finding that the DHS did not sustain the charge of inadmissibility and terminating proceedings. The respondent argues that the Immigration Judge's decision is correct and should be affirmed. The appeal will be dismissed.

The respondent became a lawful permanent resident on March 20, 2001 (Exh. 1; I.J. at 2). On (b) (6) 2009, the respondent presented himself, along with his wife and stepchild, at the port of entry in (b) (6) Arizona (Exh. 1; I.J. at 3). Marijuana was discovered in the walls of a cooler in the trunk of the car that the respondent's wife was driving (I.J. at 6). The DHS presented as witnesses three officers who were present during the investigation of the cooler, (I.J. at 7-11). Due to inconsistencies or contradictions between the officers' testimony and the respondent's assertion that he was unaware of the presence of an illegal controlled substance in the cooler, the Immigration Judge concluded that the DHS did not meet its burden of establishing inadmissibility (I.J. at 6). The DHS argues that the Immigration Judge relied upon clearly erroneous inconsistency findings and failed to give the respondent's admission proper weight. We review the Immigration Judge's findings of fact and determinations of credibility for clear error, but review de novo questions of law, discretion, and judgment, and all other issues. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

When the respondent presented himself for inspection as a returning lawful permanent resident, he could not be treated as an applicant for admission unless the DHS established the applicability of one or more of the six statutory conditions enumerated in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C). See *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). Section 101(a)(13)(C)(v), provides that an alien lawfully admitted for permanent residence is regarded as seeking admission when they have committed an offense identified in section 212(a)(2) of the Act. Section 212(a)(2) of the Act, in turn, requires either a conviction or an

admission. See *Vartelas v. Holder*, 132 S.Ct. 1479, 1492 n. 11 (2012) ("The entire § 1101(a)(13)(C)(v) phrase "committed an offense identified in section 1182(a)(2)," on straightforward reading, appears to advert to a lawful permanent resident who has been convicted of an offense under § 1182(a)(2) (or admits to one)."). Inasmuch as there is no conviction or admission in this instance, the DHS did not establish that 101(a)(13)(C)(v) applies in this instance. See *Matter of K-*, 7 I&N Dec. 594, 597 (BIA 1957) (outlining the conditions for a proper admission to be used as a basis for inadmissibility). Accordingly, irrespective of whether the Immigration Judge erred in concluding that the DHS did not meet its burden to show that the respondent was inadmissible under section 212(a)(2)(C), the Immigration Judge properly terminated proceedings.

ORDER: The appeal is dismissed.

FURTHER ORDER: The removal proceedings against the respondent are terminated.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Las Vegas, NV

Date: OCT 27 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Chalak K. Richards, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony as defined in section 101(a)(43)(G)

APPLICATION: Reopening

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen his removal proceedings based on a change in the law. In our March 26, 2012, decision we dismissed his appeal from the Immigration Judge's December 6, 2011, decision which found him removable and denied his application for (b) (6). His motion filed in September of 2015 is untimely. The record before us does not contain a response from the Department of Homeland Security. We will reopen proceedings sua sponte.

The respondent's status was adjusted to that of a lawful permanent resident on May 1, 2000 (Exh. 1). He was convicted in 2007 in a Nevada criminal court for possession of stolen property (Exh. 2). He was removed from the United States through self-deportation on August 12, 2013 (Motion at unnumbered 2). The change in the law occurred on April 8, 2014 (discussed below). *See generally Wiedersperg v. INS*, 896 F.2d 1179, 1181-82 (9th Cir. 1990) (subsequently vacated conviction was the sole ground of deportation). Here, the conviction which was the sole ground of deportability was impacted by a subsequent change in the law. We conclude that we have jurisdiction over the respondent's motion.

The respondent was convicted in 2007 of possession of stolen property in violation of Nev. Rev. Stat. § 205.275 and was sentenced to a term of imprisonment of 12 - 30 months (Exh. 2). The Immigration Judge found that his conviction constituted a theft offense under section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), and he did not contest this finding on appeal.

In *Matter of Sierra*, 26 I&N Dec. 288 (BIA 2014) the Board held that under the law of the United States Court of Appeals for the Ninth Circuit, the offense of attempted possession of a stolen vehicle in violation of sections 193.330 and 205.273 of the Nev. Rev. Stat., which requires only a mental state of "reason to believe," is not categorically an aggravated felony "theft offense (including receipt of stolen property)" under sections 101(a)(43)(G) and (U) of the Act. The respondent's conviction is under Nev. Rev. Stat. § 205.275, which states that a person commits

an offense involving stolen property either “[k]nowing that it is stolen property,” or “[u]nder such circumstances as should have caused a reasonable person to know that it is stolen property.” The second part of the mental state requirement in Nev. Rev. Stat. § 205.275 is equivalent to the “reason to believe” mental state required in the criminal statute at issue in *Matter of Sierra, supra*. The respondent pled guilty to the crime alleged in the charging document of possession of stolen property “which Defendant knew, or had reason to believe, had been stolen.” Assuming, without deciding, that section 205.275 of the Nev. Rev. Stat. is a divisible statute, a modified categorical approach would not resolve the question before us, since the conviction record does not establish whether the respondent was convicted under the “knowing” or “reason to believe” portion of the statute. Because the respondent was a lawful permanent resident, and the possession of stolen property offense was the sole ground for removal, we will reopen sua sponte and will order the proceedings terminated.

Accordingly, the following orders will be entered.

ORDER: We reopen the proceedings sua sponte.

FURTHER ORDER: The proceedings are hereby terminated.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Guaynabo, PR

Date: JAN - 7 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Rosaura Gonzalez-Rucci, Esquire

ON BEHALF OF DHS: Jorge Ramos
Senior Attorney

APPLICATION: Reconsideration

The respondent has filed a timely motion to reconsider the Board's August 4, 2015, decision dismissing his appeal of the Immigration Judge's February 20, 2014, decision finding him inadmissible as charged and ordering him removed from the United States. The motion will be granted, the proceedings will be reopened, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

In the Board's August 4, 2015, decision, we declined to address the respondent's sole appellate contention that the Immigration Judge erred in finding him inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), based solely on the evidence regarding his 2012 conviction for the offense of fraud and misuse of visas, permits, and other documents in violation of 18 U.S.C. § 1546(a), without providing him the opportunity to establish that he "timely recanted" his false claim to United States citizenship (I.J. at 6-7). Specifically, we declined to address the respondent's contention because the respondent did not dispute the other charges of inadmissibility rendering him removable from the United States.

Through his motion to reconsider, the respondent asserts that the Board erred in not addressing his arguments pertaining to section 212(a)(6)(C)(ii) of the Act because, *inter alia*, a finding on this charge has ongoing future collateral consequences in terms of his eligibility for future relief. The respondent points out in his motion that he has United States citizen children, a lawful permanent resident mother and brother, and an approved I-130 visa petition and that the Board's decision to not address the fraud charge, for which there is no waiver, could prevent him permanently from obtaining future relief. We agree and find that the respondent's motion should be granted and his proceedings reopened for a final decision on the fraud charge under section 212(a)(6)(C)(ii) of the Act. *See* 8 C.F.R. § 1003.1(c) (2015).

On appeal, the respondent argued that the Immigration Judge erred in concluding that he is removable and ineligible for relief without having taken evidence as to whether he "timely and voluntarily" recanted his claim of United States citizenship based on an admittedly photo-altered driver's license, social security card, and birth certificate in another person's name. We find that a remand is necessary for fact-finding and consideration of whether the respondent has met his burden in establishing a "timely recantation." *See* 8 C.F.R. § 1003.1(d)(3)(ii) (*de novo* review).

The doctrine of "timely recantation" is of long standing. We have long recognized the virtue of applying that principle when an alien "voluntarily and prior to any exposure of the attempted fraud corrected his testimony that he was" entitled to admission to the United States. *See Matter of R-R*, 3 I&N Dec. 823 (BIA 1949). For example, in *Matter of R-R*, cited by the respondent, the alien, when applying for admission to the United States, claimed to be a citizen of the United States and exhibited a birth certificate of a younger brother, the dates on the certificate having been altered. *See id.* at 826. The alien then executed a certificate before the primary inspector alleging he was his brother and a citizen by birth in the United States. *See id.* Right after executing this affidavit the alien admitted to the *primary* inspector that he had lied. *See id.* (emphasis added). Thus, in that case, the recantation was made to the primary inspector and not after referral to secondary inspection (I.J. at 6).¹

In this case, the evidence in the record indicates that the respondent told the truth about his identity after he was referred to a secondary inspection and was given his Miranda warnings (Exh. 2).² The evidence is not more specific as to the details of the events that transpired (Exh. 2). Further, the Immigration Judge did not engage in any fact-finding on this issue and did not give the respondent the opportunity to present evidence of his claim that he "timely recanted" such that he may not be inadmissible under section 212(a)(6)(C)(ii) of the Act and may be eligible for relief from removal. Given the circumstances in this case, we find it necessary to remand the record for the Immigration Judge to determine whether the respondent's eventual admissions were made "prior to any exposure of the attempted fraud." *See Matter of M-*, *supra*.

Accordingly, the motion will be granted, the proceedings will be reopened, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

ORDER: The motion is granted, the proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.


FOR THE BOARD

¹ Like the alien in *Matter of R-R*, the alien in *Matter of M-*, 9 I&N Dec. 118 (BIA 1960), also recanted his misrepresentation prior to the completion of his primary statement to an immigration inspector. *See id.*

² This is based on the facts and evidence incorporated into the respondent's plea agreement (Exh. 2).

Falls Church, Virginia 22041

File: (b) (6) – Buffalo, NY

Date: MAY 25 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jaspreet Singh, Esquire

APPLICATION: Reopening

The final administrative decision in this matter was entered on December 6, 2010. The case was last before the Board on August 29, 2013, when we denied the respondent's first motion to reopen. On April 4, 2016, the respondent filed another motion to reopen. The motion will be denied.

With certain exceptions, an alien is entitled to file one motion to reopen and the motion must be filed not later than 90 days after the final administrative order. *See* section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). The respondent's motion is both time-barred and number-barred.

There is an exception to the filing requirements for motions to reopen that seek to apply or reapply for (b) (6) arising in the country of nationality. *See* 8 C.F.R. § 1003.2(c)(3)(ii); *see also* section 240(c)(7)(C)(ii) of the Act. The respondent contends that his motion is (b) (6) in India since his last hearing.

The respondent, a native and citizen of India, states that recent evidence of country conditions establishes (b) (6)

(b) (6). He further states that (b) (6). In addition to a country report on India, the respondent has submitted affidavits from five individuals that describe Indian (b) (6) over the last 15 years. According to the affidavits, (b) (6) respondent's wife and son, have (b) (6) about the respondent's (b) (6) to (b) (6) when the respondent returns. The respondent claims that (b) (6) and because of (b) (6).

The affidavits do not establish changed conditions since September 12, 2008, when the record was closed in this case (Tr. #2 at 62). *See Norani v. Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006) (holding that the date the Immigration Judge closed the record is the proper baseline for determining whether country conditions have changed). Though the affidavits mention some (b) (6) in general they describe a continuation of circumstances, including

(b) (6)

periodic police visits, over the last 15 years. Furthermore, the Department of State's Country Report on India for 2014, which the respondent has submitted, does not describe conditions that are materially different than those at the time the record was closed. See United States Dept. of State Bureau of Democracy, Human Rights, and Labor, *India, Country Report on Human Rights Practices 2014*. Moreover, the report does not establish that (b) (6) India at (b) (6) .

Because the respondent has not demonstrated (b) (6) in India that are material to his eligibility for (b) (6) or related relief, his untimely motion to reopen will be denied. His request for a stay of removal pending adjudication of this motion is now moot.

ORDER: The motion to reopen is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

APR - 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Yee Ling Poon, Esquire

APPLICATION: Reopening

This case was last before us on May 13, 2004, when we denied the respondent's prior motion to reopen his removal proceedings. On September 15, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion exceeds both the time and number limitations for motions to reopen, and it will be denied.

An alien may file only one motion to reopen and, with certain exceptions, it shall be filed within 90 days of the date of entry of a final administrative order. *See* 8 C.F.R. § 1003.2(c)(2); section 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A) and (C)(i). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6)

(b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent, a native and citizen of China, applied for (b) (6). He previously sought reopening based on a claim of ineffective assistance of counsel. He now seeks reopening to apply for (b) (6) based on (b) (6) and a claim of (b) (6) in China. He asserts that his evidence shows deterioration of the Chinese (b) (6) since his hearing. *See* Motion at 3-12.

He reports that in (b) (6) 2014, he went to a (b) (6), that he continued to (b) (6), and that he (b) (6). *See* Exhibit A at 1. He relates that he (b) (6), and (b) (6), 2015. *Id.* at 1-2. The respondent claims that (b) (6) China do not have the (b) (6)

(b) (6)

(b) (6) and
(b) (6). *Id.* at 2. He states that there is a (b) (6) but it is not (b) (6). *Id.* He declares that if he were to return to China, he would (b) (6) that the (b) (6). *Id.*

The respondent offers his (b) (6) application, affidavit, birth certificate, (b) (6), a letter and employment authorization card of a friend in the United States, photographs, our prior orders and the Immigration Judge's decisions in his case, a 2007 house church statement, portions of the 2008 and 2009 Country Reports on China, portions of the 2009-2012 (b) (6) excerpts from the 2009, 2011, and 2012 Annual Reports of the Congressional-Executive Commission on China (CECC), a page from the 2013 Annual Report of the U.S. Commission on (b) (6), research articles, and media reports.

The instant case arises in the jurisdiction of the United States Court of Appeals for the Second Circuit, and we decline to apply the decisions that the respondent cites from outside of the Second Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time and number limitations for motions to reopen, and he has not established his prima facie eligibility for relief. *See* (b) (6) (a motion to reopen based on (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

The respondent's evidence is not sufficient to demonstrate (b) (6) in China since the time of his hearing in 2000. The evidence reflects that China continues to (b) (6), although there have been (b) (6), or (b) (6). *See, e.g.,* Exhibit C at 1-2, 11-14; Exhibit D at 132-138; Exhibit E at 1, 15-16; Exhibit F at 5; Exhibit G at 1-8; Exhibit H at 1-8; Exhibit I at 94, 103-105; Exhibit J at 37; Exhibit K at 85; Exhibit L at 1-10; Exhibit N at 1-7.¹ The evidence demonstrates that the (b) (6) in degree and varied significantly from region to region. *Id.; see also* Exhibit P at 2. Further, it indicates that (b) (6) of some (b) (6), including at the time of the respondent's 2000 hearing. *See, e.g.,* Exhibit F at 1; Exhibit G at 1; Exhibit H at 1-2; Exhibit I at 94; Exhibit J at 37; Exhibit L at 1; Exhibit N at 1 ("(b) (6) outside of state approved parameters). We conclude that the respondent's evidence is inadequate to show (b) (6) in China with respect (b) (6), since the time of the respondent's 2000 proceedings.

¹ Exhibit H includes both the July-December 2010 (b) (6) report and a duplicate of Exhibit N, the 2012 (b) (6) report. Our reference to Exhibit H is to the July-December 2010 (b) (6) report.

(b) (6)

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Shao v. Mukasey, supra.* We find that evidence of the (b) (6) in China is not sufficient to prima facie demonstrate that the respondent in this case has (b) (6) upon his return (b) (6) because it does not indicate a (b) (6) in China (b) (6). *See* (b) (6) (2d Cir. 2005). We conclude that the respondent has not satisfied his burden of proof to prima facie establish (b) (6) China (b) (6).

The respondent has not made a prima facie showing that (b) (6)

upon his return. *See* (b) (6).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. The evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing another late motion to reopen to apply for (b) (6). *See* (b) (6).

The respondent has not met his burden of proving that his removal proceedings should be reopened. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the motion exceeds both the time and number limitations for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

MAR 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Martin Abraham, Esquire

APPLICATION: (b) (6)

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to reapply for (b) (6). In our August 14, 2003, decision we dismissed his appeal from the Immigration Judge's October 11, 2001, decision which found him removable and denied his applications for (b) (6). The record before us does not contain a response from the Department of Homeland Security ("DHS"). The motion will be denied.

The respondent's motion to reopen filed in January of 2016 is untimely and number barred.¹ He does not show (b) (6) in Armenia which are (b) (6) claims.

The respondent shows (b) (6) in Armenia, but does not show that they are (b) (6) claims. See Motion Exh. D, at 67-69 (two articles about (b) (6) Nagorno-Karabakh region). The respondent served in the Armenian army from 1987-1989 (I.J. at 3; (b) (6)). He (b) (6) that upon his return to Armenia he will be (b) (6). Because he would (b) (6).

However, the respondent does not show that there is a reasonable possibility of this occurring. He admits in his motion at 5 that (b) (6). He states in his declaration (Motion Exh. C) that during the 1989-1990 war with Azerbaijan, the (b) (6). An October 7, 2015, <http://www.timesofisrael.com> article (Motion Exh. D, at 70) states that an Israeli soldier with Armenian citizenship returned for a visit and was not allowed to leave the country because Armenian authorities claimed that he was required to complete 2 years of national service. The article does not state what age the soldier was when he returned to Armenia for a visit. The respondent is now (b) (6) years old ((b) (6)), and he does not present any persuasive evidence to

¹ We denied the respondent's previous motion to reopen in a January 21, 2011, decision.

(b) (6)

show that the (b) (6)

The respondent does not show (b) (6) in Armenia which are (b) (6). His (b) (6) claim is based on the same facts as his (b) (6) claims.

Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied as untimely and number barred.²



FOR THE BOARD

² Based on the respondent's health concerns, he may apply to the DHS for the favorable exercise of prosecutorial discretion.

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

FEB 22 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Lewis Hu, Esquire

APPLICATION: Reopening

On September 6, 2002, the Board affirmed without opinion an Immigration Judge's decision denying the respondent's application for (b) (6). This matter was last before the Board on April 10, 2014, when we denied the respondent's second motion to reopen his removal proceedings. The Department of Homeland Security has not responded to the motion, which will be denied.

The respondent, a native and citizen of the People's Republic of China (China), contends that reopening is warranted because he has (b) (6) (Motion to Reopen at unnumbered pg. 5). He claims that the evidence proffered with his motion makes a prima facie showing that he has (b) (6) upon his repatriation (Motion to Reopen at unnumbered pgs. 4-9). He has also indicated that he (b) (6) upon his return to China (Motion to Reopen at Tab A).¹ The respondent contends that due process will be served if proceedings are reopened (Motion to Reopen at unnumbered pgs. 2-4). In support of his motion, he has submitted a personal statement, a letter from his daughter, a copy of a certificate of (b) (6), a tithing settlement statement, photos of his activities in the (b) (6), and background materials describing recent (b) (6) in China.

The instant motion is both untimely and number-barred. See section 240(c)(7)(A), (C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), (C). We recognize that the time and numerical limitations on motions to reopen do not apply to motions to reopen proceedings to apply or reapply for (b) (6) and related relief based on (b) (6) "arising in the country of nationality" if such evidence is material and was not available and could not have been presented at the previous hearing. Section 240(c)(7)(C)(iii) of the Act;

¹ We note that the respondent also claims, conversely, to be a (b) (6) (Motion to Reopen at unnumbered pg. 7). However, he has neither proffered any evidence to support that assertion nor offered any explanation for why he would claim to be both (b) (6). Therefore, we will assume for purposes of this motion that the respondent is actually asserting a (b) (6), and not (b) (6).

8 C.F.R. § 1003.2(c)(3)(iii); *Matter of S-Y-G-*, 24 I&N Dec. 247, 258 (BIA 2007) (describing the alien's "heavy burden" to show that the proffered evidence is material, reflects changed circumstances arising in the country of nationality, and supports a prima facie case for a grant of relief), *aff'd*, *Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008). However, the respondent has not shown that this exception applies to his case.

Initially, the respondent's (b) (6) in the United States, standing alone, constitutes a (b) (6) in the country of nationality, such that his motion may be found to fall within the exception to the time and number limits for motions to reopen. *See Yuen Jin v. Mukasey*, 538 F.3d 143, 155 (2d Cir. 2008); *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006).

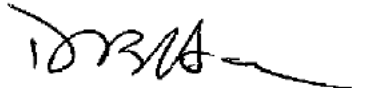
Moreover, the respondent has failed to demonstrate a (b) (6) in China. First, we afford the respondent's daughter's letter of support, in which she describes the (b) (6) in the United States, minimal weight. The letter is unsworn, and it appears to have been prepared for the purpose of assisting the respondent with litigation (Motion to Reopen at Tab C). *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 214 (BIA 2010) (giving diminished weight to letters from relatives that were written by interested witnesses not subject to cross-examination), *rev'd on other grounds*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012).

Further, the respondent's country conditions evidence does not reflect (b) (6) since his June 6, 2001, individual hearing before the Immigration Judge. The U.S. State Department's *Human Rights Report: China-2000*, which was submitted prior to his individual hearing, describes the (b) (6) within the country (Administrative Record at Exh. 7). The news articles submitted in support of the respondent's instant motion documenting China's recent efforts to (b) (6) (Motion to Reopen at Tab G).

Furthermore, the respondent has not shown how the articles submitted in support of his motion, which focus mainly on (b) (6) in Beijing and Zhejiang Province, are material to his claim, inasmuch as he hails from Fujian Province and is not similarly situated to those who were (b) (6) (Motion to Reopen at Tab G). Similarly, the respondent has failed to meaningfully demonstrate that the Chinese (b) (6), which he has detailed in his motion to reopen, is material to his (b) (6) (see Motion to Reopen at unnumbered pgs. 5-8).

Based on the foregoing, we conclude that the respondent has not shown that the (b) (6) exception to the time and numerical limitation on motions to reopen are applicable in this case. Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, appearing to read 'DORBA', is written above a horizontal line.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - Newark, NJ

Date:

NOV - 2 2015

In re: (b) (6)

IN (b) (6) PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: Theodore N. Cox, Esquire

APPLICATIONS: Reopening; remand

This case was last before us on January 22, 2003, when we entered a final administrative order dismissing the applicant's appeal. On June 29, 2015, the applicant submitted the instant motion to reopen and remand pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security (DHS) has not responded to the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the applicant has not demonstrated that the exception applies to this motion.

The applicant is a native and citizen of China. She applied for (b) (6) from China. The Immigration Judge found that she was not credible. The applicant seeks to have her proceedings reopened to apply for (b) (6) in China, (b) (6) in China.

She contends that a (b) (6) in China which did not exist at the time of the original hearing, particularly in Fujian Province, and that the evidence shows the (b) (6). See Motion at 2, 9, 21. She asserts that there is the (b) (6), as (b) (6), there have been (b) (6) in some areas, and that the (b) (6) by China renders (b) (6)

(b) (6)

(b) (6). *Id.* at 3, 33-39. She claims that her evidence shows a (b) (6) throughout China, and more specifically in Fujian Province and Respondent's hometown. *Id.* at 23.

The applicant reports that she married her first husband in the United States, that their daughter was born in 2003, and that her first husband died in 2010. *See* Exhibit A, affidavit, ¶ 1. She relates that she married her current husband in 2014, and their daughter was born in 2015. *Id.*, ¶ 2. She declares that according to the (b) (6) in China, a (b) (6)

. *Id.*, ¶ 10. She claims that since (b) (6), if she is removed to China at this time, she will be (b) (6)

. *Id.* The applicant states that she went (b) (6), 2015, and since then (b) (6). *Id.*, ¶¶ 6, 8. She relates that she (b) (6)

. *Id.*, ¶ 8. She declares that if she was repatriated to China, she would (b) (6)

. *Id.*, ¶ 9. She claims that the Chinese (b) (6), and that she would be (b) (6). *Id.*

She submits four groups of exhibits, all of which contain exhibits labeled A-C, three of which contain exhibits labeled A-I, and two of which contain exhibits labeled A-JJJJ. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits. As a result, our analysis necessarily involves lengthy lists identifying which of these documents we are addressing.

The applicant offers her (b) (6) application, affidavit, birth certificate, and marriage certificates, her former husband's death certificate, her current husband's birth certificate and affidavit, her children's birth certificates, and photographs.

She also offers correspondence from her counsel, the Nationality Law of the People's Republic of China, the 1999 Chang Le City Family Planning Q&A Handbook, the Langqi Town Family Planning Q&A Handbook, the Ying Qian Town Family Planning Q&A Handbook, the 2003 Consular Information Sheet, a 2003 Administrative Decision of the Fujian Province Family Planning Administration, a 2005 Lianjiang County Guantou Township Committee Official Directive, Responses to Information Requests from the Immigration and Refugee Board of Canada, Responses from the Refugee Review Tribunal of Australia, inquiries and responses from the Mei Hao Jia Yuan website, the Fuzhou Call Center for the Convenience of the People, and the Fujian Province Population and Family Planning Committee, documents that purport to be from the Changle City Population and Family Planning Leadership Group, the Chinese Communist Party Chang Le City Shou Zhan Township Committee, the Shou Zhan Township Population and Family Planning Leadership Group, the Jin Feng Township Population and Family Planning Leadership Group, the Family Planning Leading Group of Tantou Town, the Lian Jiang County Population and Family Planning Leadership Group, and the Fuzhou City Mawei District Tingjiang Town People's Government, reports and regulations from Quanzhou City Rural Area, Guhuai Town, Changle localities, Langqi Town, Cangshan District, Long Tian

Township, Guantou Town, Xiuyu District, Xiang An, Guangze County, Zhangpu County, Nanyang Town, Sha County, and Ying Qian Town, responses to Freedom of Information Act (FOIA) requests and a FOIA appeal, portions of 2002 and 2004 State Department reports, portions of the 2004, 2005, and 2007 Country Profiles on China, portions of the 1994, 1995, 2012, and 2013 Country Reports on China, a 2007 report of investigation by the U.S. Citizenship and Immigration Services, portions of the 2009 through 2014 Annual Reports of the Congressional-Executive Commission on China (CECC), portions of the 2010 through 2013 International Religious Freedom (IRF) Reports, portions of the 2011 through 2015 Annual Reports of the U.S. Commission on International Religious Freedom (USCIRF), the transcript of the 2014 congressional testimony of (b) (6), evidence submitted in unrelated (b) (6) cases, an affidavit and vita of Dr. (b) (6) of the Julius-Maximilians University in Germany, research articles, media reports, and a 1997 decision of the United States Court of Appeals for the Seventh Circuit.

The instant case arises in the jurisdiction of the Third Circuit, and we decline to apply the decisions that the applicant offers and cites from outside of the Third Circuit. We will deny the applicant's motion because she has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and she has not established her *prima facie* eligibility for relief. *See Zheng v. Att'y Gen.*, 549 F.3d 260, 265 (3d Cir. 2008) (a motion to reopen based on (b) (6) must also demonstrate that the applicant is *prima facie* eligible for the requested relief).

The evidence regarding past and current conditions (b) (6) in China is not sufficient to demonstrate a material change since the time of the applicant's hearing in 2002. The evidence reflects that China continues to (b) (6), although there have been reports of the (b) (6). *See, e.g.*, Exhibit A, 2011 Annual Report of the USCIRF at 10, 20, 124-126, 128-130; Exhibit B, 2010 IRF Report at 1-14; Exhibit HHH, 2012 Annual Report of the USCIRF at 6-7, 13, 136-139, 143-148; Exhibit III, 2013 Annual Report of the USCIRF at 6, 16, 30-32, 35-40; Exhibit JJJ, 2014 Annual Report of the USCIRF at 47-49; Exhibit KKK, 2011 IRF Report at 1-14; Exhibit LLL, 2012 IRF Report at 1-17; Exhibit MMM, 2013 IRF Report at 1-17; Exhibit CCCC, 2009 Annual Report of the CECC at 132-140; Exhibit EEEE, 2013 Annual Report of the CECC at 21-22; Exhibit FFFF, 2012 Annual Report of the CECC at 14-15; Exhibit JJJJ, 2014 Annual Report of the CECC at 90-93, 95-99; Supplemental Exhibit B(c), 2015 Annual Report of the USCIRF at 33-36. We have found that U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *see also Yu v. Att'y Gen. of U.S.*, 513 F.3d 346, 349 (3d Cir. 2008) (State Department reports are persuasive); *Zubeda v. Ashcroft*, 333 F.3d 463, 478 (3d Cir. 2003) (country reports are the most appropriate and perhaps the best resource for information on political situations in foreign nations).

Moreover, the evidence indicates that the (b) (6) by the Chinese (b) (6), including the time of the applicant's hearing in 2002. *See, e.g.*, Exhibit B, 2010 IRF Report at 1-14; Exhibit E, (b) (6) Review Tribunal of Australia response, §§ 1.1, 1.2. We conclude that the applicant's evidence is

(b) (6)

inadequate to show a (b) (6) in China with respect to the (b) (6). See (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. See *Zheng v. Att'y Gen.*, *supra*. The reports of (b) (6) does not prima facie demonstrate that the applicant in this case has (b) (6) upon her return to China (b) (6) because it does not indicate a (b) (6). We conclude that the applicant has not satisfied her burden to prima facie establish the likelihood of (b) (6) because she has not provided adequate evidence to show that she will (b) (6) on that basis.

The evidence regarding past and current conditions in China faced (b) (6) since the time of the applicant's hearing in 2002. The evidence reflects that (b) (6). See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, 1995 Country Report, § VII; Exhibit TTT, 1998 Country Profile, § IV(1) and (2); Exhibit UUU, 2004 Country Profile, § IV; Exhibit VVV, 2005 Country Profile, § IV; Exhibit XXX, 1994 Country Report, § VII; Exhibit BBBB, 2013 Annual Report of the CECC at 26-27, 99-103; Exhibit CCCC, 2012 Annual Report of the CECC at 18-19, 90-93; Exhibit DDDD, 2011 Annual Report of the CECC at 22-23, 110-114; Exhibit EEEE, 2013 Country Report at 54-57; Exhibit FFFF, 2012 Country Report at 56-59; Exhibit HHHH, 2014 Annual Report of the CECC at 28-29, 103-106. Moreover, the evidence indicates that (b) (6) in some areas of China have been a longstanding concern, including the time of the applicant's 2002 proceedings. See, e.g., Exhibit SSS, 1995 Country Report, § VII; Exhibit TTT, 1998 Country Profile, § IV(1) and (2); Exhibit XXX, 1994 Country Report, § VII.

While some of the documents offered by the applicant announce renewed efforts to (b) (6) that have been in place since the 1980s, they do not describe a significant (b) (6) laws. See, e.g., Exhibit U (response to a 2008 inquiry from (b) (6) on the website of the Population and Procreation Planning Committee of Fujian Province); Exhibits MM-OO, Jin Feng Township Reports; Exhibits RR-TT, Tantou Town Notices. At most, these reports reflect that (b) (6) vary from locale to locale and fluctuate incrementally from time to time. See e.g., Exhibit X, Quanzhou City Rural Area Report; Exhibits CC-FF, PP, and PPP, Changle City Population and Family Planning Bureau Notices and Announcements; Exhibits GG-II, Shou Zhan Township Committee Announcements; Exhibits KK-LL, Ying Qian Town Notices; Exhibits UU-WW, Langqi Town Reports; Exhibits AAA-DDD and FFF-HHH, Guantou Town Reports.

The applicant is from (b) (6). The documents regarding the local (b) (6) in conditions there, but rather a

continuation of the policy in place at the time of the applicant's proceedings in 2002. See Exhibits UU-WW, Family Planning Office Langqi Town publications; *Zhu v. Att'y Gen.*, 744 F.3d 268 (3d Cir. 2014). The documents that relate to the (b) (6) in the applicant's province, Fujian, include the Nationality Law of the People's Republic of China, the 2002 Population and Family Planning Regulations of Fujian Province, a 2003 Administrative Decision of the Fujian Province Department of Family Planning Administration, a 2006 reply from the Fujian Province Population and Family Planning Commission, the 1998, 2004, 2005, and 2007 Country Profiles on China, the 1994, 1995, 2012, and 2013 Country Reports on China, and the 2009-2014 Annual Reports of the CECC. See Exhibit A, 2010 Annual Report of the CECC; Exhibit B, 2009 Annual Report of the CECC; Exhibit E, 2007 Country Profile; Exhibit M, Nationality Law; Exhibits SSS – VVV, 1995 Country Report and 1998, 2004 and 2005 Country Profiles; Exhibit XXX, 1995 Country Report; Exhibits BBBB – FFFF, 2011-2013 Annual Reports of the CECC and 2012-2013 Country Reports; Exhibit HHH, 2014 Annual Report of the CECC. These documents indicate that (b) (6) continue to be used (b) (6) in the applicant's locality and her province.

Further, they reflect that (b) (6) residing in the applicant's locality are subject to the longstanding (b) (6). See e.g., Exhibit A, 2010 Annual Report of the CECC at 23, 119 (citing instances of (b) (6)); Exhibit B, 2009 Annual Report of the CECC at 153-156 (citing instances of (b) (6) despite national law (b) (6)); Exhibit E, 2007 Country Profile, Appendix B, Chapter 5, Incentives and Rewards; Exhibit WWW, Report of Investigation, attachment 4. The evidence indicates a continuation of (b) (6) in place since the time of the applicant's removal proceedings in 2002. It is not adequate to demonstrate (b) (6).

The applicant's evidence for her (b) (6) claim does not establish her prima facie eligibility for relief. The reports of some (b) (6) in some areas of China contrary to the national policy is not sufficient to prima facie establish the (b) (6) upon her return to China because the evidence does not indicate the (b) (6) in the United States. See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, 1995 Country Report, § VII; Exhibit TTT, 1998 Country Profile, § IV(1) and (2); Exhibit UUU, 2004 Country Profile, § IV; Exhibit VVV, 2005 Country Profile, § IV; Exhibit XXX, 1994 Country Report, § VII; Exhibit BBBB, 2013 Annual Report of the CECC at 26-27, 99-103; Exhibit CCCC, 2012 Annual Report of the CECC at 18-19, 90-93; Exhibit DDDD, 2011 Annual Report of the CECC at 22-23, 110-114; Exhibit EEEE, 2013 Country Report at 54-57; Exhibit FFFF, 2012 Country Report at 56-59; Exhibit HHHH, 2014 Annual Report of the CECC at 28-29, 103-106; *Zhu v. Att'y Gen.*, *supra*.

We give limited weight to the documents that the applicant offers that were submitted in (b) (6) of persons from other areas of China who are not related to her because she has not shown that they are material to her claim nor demonstrated that the circumstances in those cases are the same as the circumstances in her case. See Exhibit QQQ, (b) (6) documents; Exhibit RRR, (b) (6) documents; Exhibit GGGG, (b) (6) documents.

Dr. (b) (6)'s affidavit sets forth her opinion as to the authenticity of several of the applicant's foreign documents. See Exhibit JJ, affidavit. However, her opinion speculates as to the credibility of the authors and the circumstances under which the documents were created, and we do not find it to be persuasive.

The applicant has not demonstrated that she would be (b) (6). See (b) (6) (BIA 2007)(a showing of (b) (6) where the record contains scant information concerning the applicant's (b) (6)). She has not offered information to establish her (b) (6) nor adequate evidence to demonstrate that she would (b) (6) in China. See (b) (6) (3d Cir. 2005).

Further, the applicant has not made a prima facie showing that (b) (6) upon her return because her evidence does not indicate a (b) (6). See (b) (6).

We conclude that the applicant has not met the requirements of 8 C.F.R. § 1003.2(c)(3)(ii). Her evidence is not sufficient to establish (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6) (BIA 2006). She has not satisfied her burden to demonstrate that her (b) (6) proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the applicant's motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The applicant's motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

MAR 15 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: John Gehart, Esquire

APPLICATION: Reopening

The respondent has filed a timely motion to reopen, in which he claims that he has new evidence pertinent to his eligibility for adjustment of status in the exercise of discretion. The Department of Homeland Security ("DHS") has not opposed the motion. The motion will be granted and the record will be remanded.

Applicable regulations provide that a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1). In addition, the regulations provide that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* Where an alien seeks to renew an application for relief, a showing of changed circumstances since the time of the hearing must also be made. *Id.* Moreover, a movant must satisfy the "heavy burden" of establishing that if the proceedings were reopened, with all the attendant delays, the new evidence would likely change the result in the case. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

We conclude that the respondent has established that reopening of these proceedings is warranted. In our September 14, 2015, decision, we affirmed the Immigration Judge's determination that the respondent did not establish that he merited adjustment of status in conjunction with a waiver of inadmissibility under section 212(h)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)(1)(A), in the exercise of discretion.

In his motion, the respondent asserts that reopening is warranted because he has new evidence that subsequent to our September 14, 2015, order (1) he has been diagnosed with anxiety disorder; (2) he has been diagnosed with diabetes; and (3) his United States citizen mother's health has deteriorated. The respondent has also proffered additional evidence that he asserts is relevant to his claim that he has been rehabilitated and no longer consumes alcohol.

We conclude that the respondent has proffered evidence that warrants remanding for the Immigration Judge to consider the new evidence in the first instance. In the remanded proceedings the Immigration Judge shall consider the new evidence proffered by the respondent as it relates to whether the respondent merits adjustment of status and a waiver of inadmissibility in the exercise of discretion. Accordingly, the following orders will be entered.

ORDER: The respondent's motion to reopen is granted.

FURTHER ORDER: The record is remanded for further proceedings consistent with the forgoing opinion and for the entry of a new decision.


FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date: APR 22 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Thomas Barra, Esquire

APPLICATION: Reopening

This case was last before us on April 17, 2003, when we entered a final administrative order dismissing the respondent's appeal. On February 29, 2016, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. She applied for (b) (6) from China. The Immigration Judge found that she was not credible. The respondent seeks reopening to apply for (b) (6) in China. She states that (b) (6) in the United States, and that as (b) (6) in the United States, (b) (6) in China would apply to her due to a (b) (6) if she returned to China. See Exhibit B(2), §§ I, III.

She offers her (b) (6) application, affidavit, (b) (6), our prior decision, the Immigration Judge's order, photographs, media reports, and decisions of the United States Courts of Appeal for the Second and Third Circuits.

The instant case arises in the jurisdiction of the Second Circuit, and we decline to apply the decisions that the respondent offers and cites from outside of the Second Circuit. We will deny the respondent's motion because she has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and she has not established her prima facie eligibility for relief. See (b) (6) (a motion to reopen (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

The respondent has not offered evidence of the (b) (6) in China. Her evidence reflects that since 2006, there have been (b) (6) in China, (b) (6). See Exhibit E. The evidence is inadequate to show a (b) (6) in China with respect to (b) (6) in the United States since the time of the respondent's hearing in 2000. See *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *generally Leng v. Mukasey*, 528 F.3d 135 (2d Cir. 2008); *Wang v. BLA*, 437 F.3d 270, 274 (2d Cir. 2006) (a (b) (6) cannot suffice).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. See *Shao v. Mukasey*, *supra*. The evidence is not sufficient to demonstrate that that the respondent in this case will (b) (6) in the United States because her evidence is inadequate to show that the Chinese (b) (6) in the United States, and does not establish the likelihood that she (b) (6) in China (b) (6). See Exhibit E; (b) (6).

The respondent has not made a prima facie showing that it is (b) (6) upon her return because her evidence does not indicate a (b) (6). See (b) (6). The evidence she offers on (b) (6) in China consists of media reports, and we find that they are insufficient to support her claim that she is (b) (6) upon her return to China. See Exhibit E.

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(i) of the Act. Her evidence is insufficient to establish a (b) (6) so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6). She has not met her burden of proving that her removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Atlanta, GA

Date:

MAR - 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATIONS: Reopening; stay of removal

This case was last before us on October 31, 2002, when we entered a final administrative order dismissing the respondent's appeal. On December 14, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. He requests a stay of removal. The Department of Homeland Security has not responded to the motion. The motion has been filed out of time, and it will be denied. The respondent's stay request will also be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. He applied for (b) (6) from China. The Immigration Judge found that he was not credible. The respondent seeks reopening to apply for (b) (6) based on (b) (6) in China, (b) (6) in China. He asserts that his evidence demonstrates that (b) (6),” and that (b) (6) in Respondent's region of China since his initial proceedings in 2000. See Motion at 1, 3, 17. He contends that reopening sua sponte is warranted.

He offers his (b) (6) application, affidavit, birth certificate, marriage certificate, and (b) (6), his wife's social security card and (b) (6), his children's birth

(b) (6)

certificates and (b) (6), letters and driver's licenses from friends in the United States, and a photograph.

He also offers a portion of the 1982 Constitution of the People's Republic of China, the 2002 Population and Family Planning Law of the People's Republic of China, a portion of the 2005 Law of the People's Republic of China on Penalties for Administration of Public Security, a 2008 (b) (6) in China, an article of the Criminal Law of the People's Republic of China, a portion of the 2014 Country Report on China, a portion of the 2014 International Religious Freedom Report (IRF), a 2014 Report from the Immigration and Refugee Board of Canada, the 2015 Annual Report of the (b) (6) on China, a portion of the 2015 Annual Report of the Congressional-Executive Commission on China (CECC), a portion of the transcript of a 2015 congressional hearing, research articles, and media reports.

The respondent relates that he first (b) (6) 2014, (b) (6), and got more (b) (6). See Respondent's affidavit, ¶¶ 5, 6. He reports that he (b) (6) with him and that he, his wife, and their children (b) (6). *Id.*, ¶ 7. He declares that he will (b) (6) to more people. *Id.*, ¶ 8. He states that he heard that in China there is (b) (6) was not allowed. *Id.* He claims that he will (b) (6), and he is (b) (6). *Id.*

The respondent states that he is also (b) (6) to China because of China's (b) (6). *Id.*, ¶ 9. He claims that although (b) (6) will be looser, he is (b) (6) that in some remote places in (b) (6) (b) (6) if he went back to China. *Id.*

The instant case arises in the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, and we decline to apply the decisions that the respondent cites from outside of the Eleventh Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he has not established his prima facie eligibility for relief. See *Najjar v. Ashcroft*, 257 F.3d 1262, 1302-03 (11th Cir. 2001) (a motion to reopen must demonstrate that the applicant is prima facie eligible for the requested relief). Specifically, the evidence he offers regarding past and current conditions in China is not sufficient to demonstrate (b) (6) since the time of his hearing in 2000.

The evidence reflects that China continues to allow (b) (6), although there have been (b) (6). See, e.g., Exhibit 2(a), 2014 IRF Executive Summary at 10-11; Exhibit 2(b), 2014 IRF at 1-15, 18-22; Exhibit 2(c), 2015 Annual

Report of the CECC at 2-3, 5, 120-123, 126-128; Exhibit 2(d), 2014 Country Report at 1-2, 19, 17, 19-20, 22, 38; Exhibit 2(e), 2015 Annual Report of the USCIRF at 33-36; Exhibit 4(b) at 109-110; Exhibit 6(c). The evidence demonstrates that the restrictions on (b) (6) in degree and varied significantly from region to region. *Id.*; see also Exhibit 4(a), 2013 China Aid report at 3-5, 11-27; Exhibit 7(a)-(q). Further, it indicates that (b) (6) has been a (b) (6), including at the time of the respondent's 2000 hearing. See, e.g., Exhibit 2(c) at 122 (b) (6) outside of state approved parameters); Exhibit 2(e) at 33. We conclude that the respondent's evidence is inadequate to show (b) (6) in China with respect to the (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. See *Najjar v. Ashcroft*, *supra*. We find that evidence of the (b) (6) in China is not sufficient to prima facie demonstrate that the respondent in this case has (b) (6). See generally (b) (6) in China (b) (6) (11th Cir. 2013); (b) (6) (11th Cir. 2009) (evidence of the (b) (6)). Specifically, his evidence is inadequate to demonstrate the (b) (6) upon his return to China. *Id.* We conclude respondent has not met his burden to demonstrate that he is prima facie eligible for relief based on (b) (6).

Regarding the respondent's claim based on (b) (6) in China, we find that his evidence of conditions in China faced by (b) (6) since the time of his hearing in 2000. The evidence reflects that (b) (6) continue to be used (b) (6). See, e.g., Exhibit 2(c) at 2, 6-7, 10, 143-151; Exhibit 2(d) at 2; Exhibit 2(f); Exhibit 3(a) at 1-8; Exhibit 4(b) at 110; Exhibit 5(b); Exhibit 8(a)-(i). It indicates that there have been (b) (6) in China if (b) (6) in China, and that (b) (6) in effect since before the respondent's hearing in 2000. See, e.g., Exhibit 2(c) at 143; Exhibit 3(a) at 1-8; Exhibit 4(b) at 110. The evidence is not adequate to demonstrate (b) (6) in China in the enforcement of the (b) (6).

The Eleventh Circuit concluded in *Zhang v. U.S. Att'y Gen.*, 572 F.3d 1316 (11th Cir. 2009), *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252 (11th Cir. 2009), and *Li v. U.S. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007), that we must adequately consider an alien's previously unavailable evidence that (b) (6). The respondent is from (b) (6). His evidence does not suggest a (b) (6) in his locality. Rather, it reflects that (b) (6) in the

(b) (6)

(b) (6) Province in substantially the same manner since the time of the respondent's proceedings in 2000, and does not indicate that there has been an (b) (6) in the respondent's home region. See, e.g., Exhibit 2(c) at 2, 6-7, 143-151; Exhibit 2(d) at 2; Exhibit 2(f); Exhibit 3(a) at 1-8; Exhibit 4(b) at 110; Exhibit 5(b); Exhibit 8(a)-(i). We conclude that the respondent has not provided evidence that constitutes unambiguous corroboration of (b) (6) in his local area. See (b) (6). The evidence does not demonstrate a (b) (6) for Chinese (b) (6) in China.

The respondent has not met his burden to demonstrate that he is prima facie eligible for (b) (6) in China because his evidence does not indicate (b) (6) in the United States. The evidence reflects that (b) (6), although there have been some (b) (6) in some areas of China contrary to the (b) (6). See, e.g., Exhibit 2(c) at 143-151; Exhibit 2(d) at 2; Exhibit 2(f); Exhibit 3(a) at 1-8; Exhibit 4(b) at 110; Exhibit 5(b); Exhibit 8(a)-(i). However, none of the reports describe instances where (b) (6) in the United States. *Id.* We conclude that the evidence is not adequate to prima facie establish the (b) (6) to China under (b) (6) because the evidence does not indicate the (b) (6) in the United States. See generally (b) (6) (11th Cir. 2013); (b) (6) (11th Cir. 2008).

The respondent has not made a prima facie showing that (b) (6) upon his return because his evidence does not indicate a (b) (6). See (b) (6) (11th Cir. 2010).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. His evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time limit for filing a late motion to reopen to apply for (b) (6). See (b) (6) (2d Cir. 2012); (b) (6) (BIA 2006); (b) (6). He has not met his burden of proving that his removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find that an exercise of our sua sponte authority to reopen is not warranted. See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Accordingly, as the respondent's motion exceeds the time limit for motions to reopen, it will be denied, and his request for a stay of removal will also be denied.

ORDER: The respondent's motion to reopen and request for stay of removal are denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Orlando, FL

Date:

SEP 15 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sandra Echevarria, Esquire

APPLICATION: Reconsideration

The respondent moves the Board to reconsider its May 14, 2015, decision dismissing his appeal from the Immigration Judge's July 1, 2014, decision terminating the proceedings. See section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b). The respondent has identified no error of fact or law in our prior order to warrant reconsideration. See *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). With the following comments, the motion will be denied.

The respondent argues, inter alia, that the Immigration Judge did not have jurisdiction to terminate the proceedings. See Motion to Reconsider at 9. It is undisputed, however, that the respondent was physically removed from the United States pursuant to an order of removal in 1999. The law provides that an alien who illegally reenters the United States after having been previously removed or having departed voluntarily, under an order of removal, shall be removed under the prior order. Section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5). Government officers authorized to issue a Notice to Appear are also authorized to cancel them as improvidently begun. See 8 C.F.R. § 239.2(a)(6). After proceedings have commenced, an authorized officer or government counsel can move the Immigration Judge to dismiss the matter on the grounds that it was improvidently begun. See 8 C.F.R. § 1239.2(c). It is appropriate for the Immigration Judge to terminate proceedings as improvidently begun where, as in this case, the alien is subject to reinstatement of a prior order of deportation or removal. See *Matter of W-C-B-*, 24 I&N Dec. 118, 122 (BIA 2007). Cf. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

Accordingly, the respondent's motion to reconsider will be denied.

ORDER: The motion to reconsider is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Orlando, FL

Date:

MAY - 9 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

ON BEHALF OF DHS: Chelsea Braden
Assistant Chief Counsel

APPLICATIONS: Reopening; remand

This case was last before us on July 13, 2011, when we denied the respondent's prior motion to reopen her removal proceedings. On March 3, 2016, the respondent submitted the instant motion to reopen and remand pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security opposes the motion. The motion to reopen exceeds both the time and number limitations for such motions, and it will be denied.

An alien may file only one motion to reopen and, with certain exceptions, it shall be filed within 90 days of the date of entry of a final administrative order. *See* 8 C.F.R. § 1003.2(c)(2); section 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A) and (C)(i). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. She applied for (b) (6)

(b) (6) in China. She previously sought reopening to apply for (b) (6) in the United States and a claim of (b) (6) in China.

(b) (6)

The respondent now seeks reopening based on (b) (6) and a claim of (b) (6) in China.¹ She argues that her evidence shows “a pattern and practice of (b) (6) of China predicated on (b) (6)” and an “(b) (6)”. See Motion at 2, 8.

She reports that she was (b) (6), that when she came to the United States, she (b) (6) in Florida, and that when she moved to New York, she (b) (6) in Brooklyn and was re-(b) (6). See Exhibit A, statement. She declares that she is (b) (6) to China because there is no (b) (6). *Id.* She states that the Chinese (b) (6) in China are (b) (6) were subject to (b) (6). *Id.* She claims that if she was returned to China, she would have to (b) (6). *Id.*

The respondent offers her (b) (6) application, statement, and birth certificate, (b) (6). She also offers portions of the 2010-2013 (b) (6) portions of the 2011-2014 Annual Reports of the U.S. Commission on International Religious Freedom (USCIRF), portions of the 2009 and 2012-2014 Annual Reports of the Congressional-Executive Commission on China (CECC), a response from the (b) (6) Review Tribunal of Australia, the transcript of the 2014 congressional testimony of (b) (6), research articles, media reports, and a 1997 decision of the United States Court of Appeals for the Seventh Circuit.

The instant case arises in the jurisdiction of the Eleventh Circuit, and we decline to apply the decisions that the respondent offers and cites from outside of the Eleventh Circuit. We will deny the respondent’s motion because she has not demonstrated (b) (6) in China to warrant an exception to the time and number limitations for motions to reopen, and she has not established her prima facie eligibility for relief. See *Najjar v. Ashcroft*, 257 F.3d 1262, 1302-03 (11th Cir. 2001) (a motion to reopen must demonstrate that the applicant is prima facie eligible for the requested relief).

We find that the respondent’s evidence regarding (b) (6) in China is not sufficient to demonstrate a (b) (6) there since the time of her

¹ The instant motion mentions a (b) (6), but neither the respondent’s new statement or her (b) (6) application states a claim based on the (b) (6) in China. See Exhibit A. Further, the respondent submits two groups of exhibits both of which contain exhibits labeled A-E, and to avoid confusion we will refer to the type of document as well as the exhibit label for these exhibits.

(b) (6)

removal proceedings in 2002. The evidence reflects that there continue to be reports of (b) (6) in China, that (b) (6) continue to be (b) (6). See, e.g., Exhibit A, 2011 Annual Report of the (b) (6) at 10, 20, 124-126, 128-130; Exhibit B, 2010 IRF at 1-14; Exhibit HHH at 6-7, 13, 136-139, 143-148; Exhibit III at 6, 16, 30-32, 35-40; Exhibit JJJ at 47-49; Exhibit KKK at 1-14; Exhibit LLL at 1-17; Exhibit MMM at 1-17; Exhibit CCCC at 132-140; Exhibit EEEE at 21-22; Exhibit FFFF at 14-15; Exhibit JJJJ at 90-93, 95-99. Further, it demonstrates that the (b) (6), including at the time of the respondent's 2002 hearing. *Id.*; see also Exhibit C, 2010 Amnesty International Report at 105 ("(b) (6) outside of state approved parameters). The evidence indicates that (b) (6) differed in degree and varied significantly from region to region. See, e.g., Exhibit HHH at 138 (b) (6); also Exhibit A, 2011 Annual Report of the USCIRF at 125-126; Exhibit B, 2010 (b) (6) at 1-2; Exhibit III at 31-38; Exhibit JJJ at 48; Exhibit KKK at 2-3, 7-12; Exhibit LLL at 2-8; Exhibit MMM at 10; Exhibit CCCC at 134; Exhibit EEEE at 22; Exhibit FFFF at 14; Exhibit JJJJ at 92-93, 96; also Exhibit PPP, 2013 China Aid report at 3-5, 11-27. We find that the evidence is inadequate to show a (b) (6) in China with respect to (b) (6). See, e.g., Exhibit EEEE at 21-22; Exhibit FFFF at 14-15 (b) (6) in China and incremental (b) (6) in legal measures added uniformity to (b) (6)).

Further, the respondent has not established that she is prima facie eligible for the requested relief to meet her burden for reopening. See *Najjar v. Ashcroft*, *supra*. Her evidence of the (b) (6) in China is not sufficient to prima facie demonstrate that she has (b) (6) upon her return to China (b) (6) because it is inadequate to demonstrate a (b) (6) in China on (b) (6). See generally (b) (6) (11th Cir. 2013); (b) (6) (11th Cir. 2009) (evidence of the (b) (6)). Specifically, the evidence is inadequate to demonstrate the likelihood that the respondent in this case would be (b) (6) upon her return to China. *Id.*

The respondent has not made a prima facie showing that (b) (6) upon her return because her evidence does not indicate a (b) (6). See (b) (6) (11th Cir. 2010).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. Her evidence is not sufficient to establish a (b) (6)

(b) (6)

(b) (6) “arising in the country of nationality” so as to create an exception to the time and number limitations for filing another late motion to reopen to apply for (b) (6). See (b) (6)

(b) (6) (BIA 2010), *rev'd in part*, (b) (6)

(b) (6) (BIA 2006); (b) (6)

The respondent has not met her burden of proving that her removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the respondent’s motion to reopen exceeds both the time and number limitations for such motions, it will be denied.

ORDER: The respondent’s motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

APR 12 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James A. Lombardi, Esquire

APPLICATION: Reopening

This matter was last before the Board on December 1, 2003, when we affirmed without opinion the Immigration Judge's August 27, 2002, decision denying the respondent's applications for (b) (6).

(b) (6). The respondent filed the present motion to reopen removal proceedings on February 22, 2016. The Department of Homeland Security has not responded to the motion, which will be denied.

With certain exceptions, a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The present motion is brought more than 12 years after the Board's final order. There is an exception to the filing time limit for motions to reopen (b) (6).

(b) (6). See section (b) (6).

(b) (6). The respondent has the "heavy burden" to show that the proffered evidence is material, reflects (b) (6) in the country of nationality, based on a comparison of the evidence of country conditions submitted with the motion to those that existed at the time of the hearing, and supports a prima facie case for a grant of (b) (6). See (b) (6) (2d Cir. 2008).

The respondent, a native and citizen of Albania, claims (b) (6) in Albania, and seeks reopening on the basis of (b) (6). The motion is accompanied by approximately 44 exhibits designated A-RR. We have considered this evidence but are not required to "expressly parse or refute on the record each individual argument or piece of evidence." *Wang v. B.I.A.*, 437 F.3d 270, 275 (2d Cir. 2006).

We do not find that the evidence shows (b) (6) in Albania that are material to the respondent's eligibility for relief. The motion discusses (b) (6) that preceded the hearing (Mot. at 6-8), but does not show that (b) (6) in Albania have (b) (6) with regard to (b) (6), nor has the respondent presented specific evidence that he (b) (6). The motion cites, inter alia, (b) (6) Albania in (b) (6) that took place in 2013 (Mot. at 10). The published country information

(b) (6)

including U.S. Department of State reports submitted with the motion report that Albania is a (b) (6)

periodic elections. *See, e.g.*, Mot., Tab AA. Although the 2013 election took place in an environment in which (b) (6)

. *Id.* More (b) (6) of the (b) (6). *See* Mot., Tab DD.

The brief letters from family and friends in Albania (Mot., Tabs FF-JJ) are vague and lack specific facts or detail to show that the respondent will (b) (6) upon return. *See* (b) (6) (2d Cir. 2002) (b) (6) by family and friends are insufficient to support (b) (6) application). The expert's report (Mot., Tab W) and the various publications and news articles (Mot., Tabs Y-CC, EE) appear to indicate a (b) (6) in Albania, (b) (6), rather than (b) (6) when compared to the evidence of conditions that existed at the time of the hearing. *See* (b) (6).

To the extent the respondent seeks reopening on the basis of his marriage to a United States citizen in 2009 (several years after the final removal order) and a Form I-130 visa petition (Mot., Tabs G-J), these factors do not give rise to any exception to the filing time limit applicable to motions to reopen. *See* 8 C.F.R. § 1003.2(c)(3). It is not uncommon for an alien to become eligible for immigration benefits after a final removal order, and the respondent's motion does not demonstrate any "exceptional situation" that would warrant reopening these proceedings under the Board's limited sua sponte authority. *See Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship").

The Board concludes that the 12-year-old removal order is not subject to reopening, that the respondent has not (b) (6) in Albania, and that no exceptional situation justifies reopening. Accordingly, the respondent's motion will be denied as time-barred.

ORDER: The motion to reopen and the related request for a stay are denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JAN - 7 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sassoun A. Nalbandian, Esquire

ON BEHALF OF DHS: Mary J. Hannett
Assistant Chief Counsel

The Board entered the final administrative order in this case on November 30, 2007, when we dismissed the respondent's appeal from the Immigration Judge's decision denying his application for (b) (6)

(b) (6). On August 18, 2015, the respondent filed the instant motion to reopen based on (b) (6).¹ The Department of Homeland Security opposes the motion. The motion is untimely and will be denied. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2).

A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal. *Id.* The filing deadline imposed on motions to reopen does not apply to motions to reopen to reapply for (b) (6) based on (b) (6) in the alien's country of nationality or the country to which the alien's removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See section (b) (6) of the Act (b) (6). The alien, however, bears the "heavy burden" to show that the proffered evidence is (b) (6) arising in the country of nationality, and supports a prima facie case for a grant of (b) (6). (b) (6) (BIA 2007).

The respondent is a citizen of Armenia. The respondent's last merits hearing was conducted on March 2, 2006. Following the hearing, the Immigration Judge issued a decision finding the respondent's claim not credible, and in fact found that the respondent had filed (b) (6) applications. In our decision of November 30, 2007, we reversed the Immigration Judge's

¹ The respondent also moves to consolidate his case with the case (b) (6), his wife, and (b) (6), his daughter. The motion to consolidate is denied. See *Matter of Taerghodsi*, 16 I&N Dec. 260, 262-63 (BIA 1977) (concerning Immigration Judges' authority at the hearing level to consolidate cases); 8 C.F.R. § 1240.1(a)(1)(iv). We note that the Board denied the respondent's wife's and daughter's motion to reopen, which was filed under all three family members' names, as well as their motion to consolidate, on December 7, 2015.

finding that the (b) (6), but upheld the adverse credibility finding and the denial of relief.

The respondent, who entered the United States in 2002, now seeks reopening based on a claim of changed country conditions in Armenia. Specifically, he asserts that he faces an (b) (6) 2015 when a protest erupted in Armenia in response to the Armenian Government's increase in the price of electricity. The respondent has offered media articles reporting on a (b) (6), 2015, protest; the 2014 U.S. Department of State Country Report on Human Rights Practices for Armenia ("Country Report"); and scanned documents sent by email to the respondent's wife which indicate (b) (6) Armenia have (b) (6) in recent months, and that (b) (6). See Motion Exhibits D, E, F, G.

Initially, we find that the scanned documents lack reliability. The respondent's wife claimed in her statement that after learning of her husband's scheduled interview before Immigration and Customs Enforcement on August 19, 2015, she reached out to contacts in Armenia who agreed to send her, by email, the documents indicating that (b) (6).² The letters from the respondent's wife's contacts in Armenia, which have apparently been prepared specifically for these proceedings, lack notarization, and their authors have not sworn to the veracity of their contents. See *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Further, the respondent has not addressed the fact that an official document purportedly from the (b) (6) lacks authentication. See Motion Exhibit G; 8 C.F.R. § 1287.6. Even assuming the reliability of the scanned documents, they do not support the respondent's claim that Armenian Government (b) (6) or for his wife. Indeed, the authors of the documents neither identify the individuals who have (b) (6) nor offer a (b) (6).

With this motion, the respondent has offered evidence showing that some (b) (6) in Yerevan, the capital of Armenia, on (b) (6) 2015. See generally Motion Exhibit G. (b) (6), 2015, is not indicative of a change in (b) (6) to the Armenian Government since the removal hearing. Objective evidence of conditions in Armenia before the Immigration Judge and the evidence offered with the motion reveal that the Armenian Government has not always upheld the rights of freedom of speech and freedom of the press. See Country Report at 7. Compare Exhibit 4 at 5; Exhibit 3 at 1, 6. See also *Matter of S-Y-G-*, *supra*, at 253 ("[i]n determining whether evidence accompanying a motion to reopen demonstrates a (b) (6) that would justify reopening, we compare

² Although the respondent stated that he would supplement the motion with the original documents that were being sent by postal mail, to date, the respondent has not offered the original documents in support of the motion. See Motion to Reopen at 8.

the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below”).

In sum, reopening these proceedings to enable the respondent to reapply for (b) (6) and (b) (6) is not warranted. See section (b) (6). Further, the respondent’s evidence does not support the claim that (b) (6) removed to Armenia. See (b) (6). Finally, it does not appear that any other exception to the filing deadline imposed on motions to reopen applies to this motion, or that an exceptional situation is present in this case to warrant reopening sua sponte. See 8 C.F.R. §§ 1003.2(a), (c)(3).

While we acknowledge the respondent’s equities in United States, “[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.” *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Accordingly, the respondents’ untimely motion to reopen is denied.³ The respondents’ request for a stay of removal is also denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

³ The respondent’s assertions that he is a low enforcement priority, and that his daughter has been granted Deferred Action for Childhood Arrivals (DACA), would not alter this decision. Any request for the exercise of discretion would have to be made to the Department of Homeland Security.

Falls Church, Virginia 22041

File: (b) (6) – Arlington, VA

Date: MAR 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alan M. Parra, Esquire

APPLICATION: Reopening

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to reapply for (b) (6)

(b) (6) In our July 7, 2004, order we affirmed without opinion the Immigration Judge's November 12, 2002, decision which found him removable and denied his applications for (b) (6). The record before us does not contain a response from the Department of Homeland Security. The motion will be granted.

The respondent's motion to reopen filed in December of 2015 is untimely and number barred.¹ He shows (b) (6) in Ethiopia that are (b) (6) claims.

The respondent's merits hearing was conducted on November 12, 2002. The Immigration Judge did not make an adverse credibility finding. Rather, he concluded that the respondent did not meet his respective burdens of proof for (b) (6) (I.J. at 9-13). The Board affirmed without opinion the Immigration Judge's decision on July 7, 2004.

The respondent presents evidence which shows that starting in 2013 he (b) (6) in the Ethiopian Government and (b) (6) in the United States. He received the (b) (6) and then started his own business. His evidence includes his declaration and a letter from (b) (6) (Motion Exhs. A, C). He presents evidence that his brother and his cousin (b) (6) to the respondent which (b) (6). His evidence includes a detailed declaration from his brother, a declaration from his cousin, and proof that his cousin was (b) (6) by the U.S. Citizenship and Immigration Services.

¹ We denied the respondent's two previous motions to reopen in decisions dated December 2, 2004, and October 19, 2005.

(b) (6)

The respondent also presents evidence that his father (b) (6) in the United States. Evidence includes his father's declaration, and declarations from two of his father's former neighbors (Motion Exhs. F, G, H). Country conditions evidence shows (b) (6) (Motion Exhs. L, M). Although similar government actions occurred in 2001 (Exh. 6, at 11-14), it is the respondent's individualized evidence that (b) (6). Upon remand, the respective burdens of proof are on the respondent to show that he satisfies the applicable eligibility requirements for (b) (6), and that he merits (b) (6) in the exercise of discretion. See section (b) (6) of the Act.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) Newark, NJ

Date: MAR 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Matthew J. Archambeault, Esquire

ON BEHALF OF DHS: Gloria M. Alfonso
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on October 27, 2015, when we dismissed the respondent's appeal. On February 1, 2016, 97 days after the Board's order, the respondent filed a motion to reopen. The Department of Homeland Security has opposed the motion. The motion will be denied.

The respondent's motion is untimely, as it was not filed within 90 days of the Board's final administrative decision.¹ Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, urges that his motion falls within the exception to the time limitations for motions to reopen to apply or reapply for (b) (6) arising in the country of nationality. Section (b) (6). The respondent argues that the country conditions in El Salvador "(b) (6)" since his previous hearing in April 2015 (Motion, at 2-3). Specifically, the respondent points to recent articles and reports stating that the (b) (6) in El Salvador. The respondent also submitted the Department of State's El Salvador (b) (6) 2016.

The evidence submitted by the respondent is insufficient to show (b) (6) to the respondent's eligibility for (b) (6). While the evidence shows (b) (6) in El Salvador, they are similar to the conditions that existed at the time of the respondent's previous hearing in April 2015, shown in part in the documents submitted at that

¹ The DHS's Opposition to the respondent's motion states that the respondent has timely filed his motion to reopen (DHS Opp., at 2). However, the motion was untimely as noted above and we are not bound by this statement in the DHS's Opposition.

(b) (6)

time. Therefore, they are the continuation of the same or similar situations, rather (b) (6) since that time. Furthermore, the documents submitted do not show that a different outcome is warranted as to the Immigration Judge's finding, upheld by the Board, that the respondent did not show that the (b) (6)

in El Salvador. See (b) (6) (BIA 1992).

Based on the above, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Newark, NJ

Date: FEB - 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

ON BEHALF OF DHS: Sam Dotro
Assistant Chief Counsel

APPLICATIONS: Reopening; remand

This case was last before us on December 8, 2004, when we entered a final administrative order dismissing the respondent's appeal. On October 5, 2015, the respondent submitted the instant motion to reopen and remand pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security opposes the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. He applied for (b) (6) from China. The Immigration Judge found that he was not credible. The respondent seeks reopening to apply for (b) (6) based on (b) (6) in China, (b) (6) in the United States, and a claim (b) (6) in China.

He contends that his evidence shows "a drastic (b) (6) throughout China, and more specifically in Fujian Province and Respondent's hometown." Motion at 7. He argues that there is "the use of

(b) (6)

(b) (6) in China's (b) (6) that "while (b) (6) to (b) (6), there have been continuing reports of (b) (6) in some areas," and that "the use of targets and quotas by China renders its (b) (6)." *Id.* at 22-23.

The respondent states that according to the (b) (6) in China, (b) (6), See Exhibit A, statement.¹ He declares that since he (b) (6), if he is removed to China at this time he will (b) (6).

Id.

He offers his (b) (6) application, statement, birth certificate, and marriage certificate, his children's birth certificates, correspondence from his counsel, the opinion and vita of (b) (6) of Columbia University, and an affidavit and vita of Dr. (b) (6) of the Julius-Maximilians University in Germany.

He also offers the Nationality Law of the People's Republic of China, the 1999 Chang Le City Family Planning Q&A Handbook, the Langqi Town Family Planning Q&A Handbook, the Ying Qian Town Family Planning Q&A Handbook, a 2003 Consular Information Sheet, a 2003 Administrative Decision of the Fujian Province Family Planning Administration, a 2005 Lianjiang County Guantou Township Committee Official Directive, Responses to Information Requests from the Immigration and Refugee Board of Canada, Responses from the Refugee Review Tribunal of Australia, inquiries and responses from the Mei Hao Jia Yuan website, the Fuzhou Call Center for the Convenience of the People, and the Fujian Province Population and Family Planning Committee, documents that purport to be from the Changle City Population and Family Planning Leadership Group, the Chinese Communist Party Chang Le City Shou Zhan Township Committee, the Shou Zhan Township Population and Family Planning Leadership Group, the Jin Feng Township Population and Family Planning Leadership Group, the Family Planning Leading Group of Tantou Town, the Lian Jiang County Population and Family Planning Leadership Group, and the Fuzhou City Mawei District Tingjiang Town People's Government, reports and regulations from Quanzhou City Rural Area, Guhuai Town, Changle localities, Langqi Town, Cangshan District, Long Tian Township, Guantou Town, Xiuyu District, Xiang An, Guangze County, Zhangpu County, Nanyang Town, Sha County, and Ying Qian Town, responses to Freedom of Information Act (FOIA) requests and a FOIA appeal, portions of 2002 and 2004 State Department reports, a 2007 report of investigation by the U.S. Citizenship and Immigration Services, portions of the 1998, 2004, 2005, and 2007 Country Profiles on China, portions of the 1994, 1995, 2012, and 2013 Country Reports on China, portions of the 2009-2014 Annual Reports of the Congressional-Executive Commission on

¹ The respondent submits two groups of exhibits, both of which contain exhibits labeled A-G. To avoid confusion, we will refer to the type of document as well as the label for these exhibits.

China (CECC), evidence submitted in unrelated (b) (6) cases, research articles, and media reports.

Dr. (b) (6)'s affidavit sets forth her opinion as to the authenticity of several of the respondent's foreign documents. *See* Exhibit JJ. However, her opinion speculates as to the credibility of the authors and the circumstances under which the documents were created, and we do not find it to be persuasive.

The instant case arises in the jurisdiction of the United States Court of Appeals for the Third Circuit, and we decline to apply the decisions that the respondent cites from outside of the Third Circuit. We will deny the respondent's motion because he has not (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he has not established his prima facie eligibility for relief. *See* (b) (6) (3d Cir. 2008) (a motion to reopen based on (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

The evidence regarding past and current conditions in China faced by (b) (6) is not sufficient to demonstrate a (b) (6) since the time of the respondent's hearing in 2003. The evidence reflects that (b) (6), and other (b) (6). *See, e.g.,* Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII; Exhibit BBBB at 26-27, 99-103; Exhibit CCCC at 18-19, 90-93; Exhibit DDDD at 22-23, 110-114; Exhibit EEEE at 54-57; Exhibit FFFF at 56-59; Exhibit HHHH at 28-29, 103-106. Moreover, the evidence indicates that (b) (6) in some areas of China have been a longstanding concern, including the time of the respondent's 2003 proceedings. *See, e.g.,* Exhibit SSS, 1995 Country Report, § VII; Exhibit TTT, 1998 Country Profile, § IV(1) and (2); Exhibit XXX, 1994 Country Report, § VII. We have found that U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part, Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *see also Yu v. Att'y Gen. of U.S.*, 513 F.3d 346, 349 (3d Cir. 2008) (State Department reports are persuasive); *Zubeda v. Ashcroft*, 333 F.3d 463, 478 (3d Cir. 2003) (country reports are the most appropriate and perhaps the best resource for information on political situations in foreign nations).

While some of the documents offered by the respondent announce renewed efforts to (b) (6) that have been in place since the 1980s, they do not describe a significant (b) (6). *See, e.g.,* Exhibit U (response to a 2008 inquiry from (b) (6) on the website of the (b) (6).

Reports; Exhibits AAA-DDD and FFF-HHH, Guantou Town Reports. At most, these reports reflect that pressures to (b) (6) vary from locale to locale and fluctuate incrementally from time to time.

The respondent is from (b) (6). The documents regarding the local enforcement in that area do not establish a material change in conditions there but rather a continuation of the policy in place at the time of the respondent's proceedings in 2003. See Exhibits UU-WW; *Zhu v. Att'y Gen.*, 744 F.3d 268 (3d Cir. 2014). The documents that relate to the (b) (6) in the respondent's province, Fujian, include the Nationality Law of the People's Republic of China, the 2002 Population and Family Planning Regulations of Fujian Province, a 2003 Administrative Decision of the Fujian Province Department of Family Planning Administration, a 2006 reply from the Fujian Province Population and Family Planning Commission, the 1998, 2004, 2005, and 2007 Country Profiles on China, the 1994, 1995, 2012, and 2013 Country Reports on China, and the 2009-2014 Annual Reports of the CECC. See Exhibits A-B, E, M, SSS-VVV, XXX, BBBB-FFFF, HHH. These documents reflect that (b) (6) continue to be (b) (6) in the respondent's locality and province.

The evidence indicates that rewards and incentives are provided to (b) (6). See e.g., Exhibit A, 2010 Annual Report of the CECC at 23, 119 (citing instances of rewards given to government employees who underwent tubal ligation and cases where salaries were withheld for refusal to undergo tubal ligation); Exhibit B, 2009 Annual Report of the CECC at 153-156 (citing instances of monetary rewards for (b) (6) and reports that some (b) (6) despite national law (b) (6)); Exhibit E, 2007 Country Profile, Appendix B, Chapter 5, Incentives and Rewards; Exhibit WWW, Report of Investigation, attachment 4. The evidence demonstrates a continuation of (b) (6) in place since the time of the respondent's removal proceedings in 2003, and is inadequate to show (b) (6) in China.

The respondent has not met his burden to establish that he is *prima facie* eligible for relief. See *Zheng v. Att'y Gen.*, *supra*. The reports of some (b) (6) in some areas of China contrary to the national policy is not sufficient to *prima facie* establish the (b) (6) upon his return to China because the evidence does not indicate the likelihood of (b) (6) in the United States. See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, 2007 Country Profile, § IV; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII; Exhibit BBBB at 26-27, 99-103; Exhibit CCCC at 18-19, 90-93; Exhibit DDDD at 22-23, 110-114; Exhibit EEEE at 54-57; Exhibit FFFF at 56-59; Exhibit HHHH at 28-29, 103-106; *Zhu v. Att'y Gen.*, *supra*.

We give limited weight to the documents that the respondent offers that were submitted in (b) (6) cases of persons from other areas of China who are not related to him because he has not

shown that they are material to his claim nor demonstrated that the circumstances in those cases are the same as the circumstances in his case. See Exhibits QQQ, RRR, GGGG.

The opinion of Professor (b) (6) regarding the (b) (6) in China does not convince us that reopening is warranted in the respondent's case. See Exhibit C, statement dated (b) (6) 2015. He states that "China's (b) (6) remains in effect and its (b) (6) to vary across space and time." *Id.*, ¶ 6. We are not persuaded that there has been (b) (6). Further, Professor (b) (6) does not identify any document or evidence that he consulted for his "own research" on the (b) (6), other than pages 103-104 of the 2014 Annual Report of the CECC and "recent online reports (2014-2015)" for his conclusions regarding Fuzhou City. *Id.*, ¶¶ 7-8. His opinion regarding (b) (6) in the United States. Therefore, we are unable to accord weight to his opinion that the respondent and his wife are "(b) (6)." *Id.*, ¶ 8.

The respondent has not demonstrated that he would be (b) (6). See (b) (6) (BIA 2007)(a showing of (b) (6) to be exacted amounts to (b) (6) does not amount to (b) (6) where the record contains scant information concerning the applicant's (b) (6)). He has not offered information to establish his current (b) (6) nor adequate evidence to demonstrate that he would (b) (6) in China. See (b) (6) (3d Cir. 2005).

He has not made a prima facie showing that (b) (6) upon his return because his evidence does not indicate a likelihood (b) (6). See (b) (6).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. His evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6). He has not satisfied his burden to demonstrate that his removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the respondent's motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Eloy, AZ

Date: NOV - 3 2015

In re: (b) (6)

IN (b) (6) PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Pro se

APPLICATION: (b) (6)

This case is before the Board pursuant to a (b) (6) 2015, order of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit remanded this matter for reconsideration of the applicant's eligibility for relief in light of intervening Ninth Circuit and Board precedent. The applicant's appeal will be dismissed.

The cases highlighted in the remand address, inter alia, what makes a (b) (6) under the Immigration and Nationality Act. See (b) (6) (9th Cir. 2014); (b) (6) (BIA 2014) (clarifying (b) (6) (same); and (b) (6) (BIA 2014) (b) (6)).

However, in this case, the Immigration Judge and the Board held that the applicant did not establish eligibility for relief because, among other things, she did not meet her burden of (b) (6) that the (b) (6) (BIA at 2; IJ at 7-8; 12). This requirement is separate and apart from the (b) (6), and is therefore unaffected by the intervening precedent referenced in the remand. See (b) (6) (9th Cir. 2013) (explaining the separate requirements of establishing that (b) (6)).

In the case at hand, as the Immigration Judge found, and the applicant testified, (b) (6) Honduras intervened each time the applicant reported (b) (6) (I.J. at 7-8, 12; Tr. at 29-31, 33, 35, 64-65). The (b) (6) but were

¹ The applicant's (b) (6) claim does not appear to be within the scope of the remand. Our disposition of that claim was not based on (b) (6) and thus is also unaffected by the intervening precedent.

(b) (6)

(b) (6); however (b) (6) (I.J. at 9, 12; Tr. at 40, 42-43, 63, 65-69). The applicant's (b) (6). However (b) (6) in Honduras have been (b) (6) (I.J. at 15; Exh. 3; Tr. at 43-44, 47, 49, 65, 67-68).

The (b) (6). See (b) (6) (9th Cir. 2010) (holding that the aliens had not established that (b) (6) [] (b) (6) (9th Cir. 2005) (holding that, although (b) (6) []). We acknowledge that (b) (6). However, given the efforts that have been (b) (6), the (b) (6) on other matters, we are not convinced that the (b) (6).

Accordingly, the applicant has not established her eligibility for (b) (6) and we will dismiss the appeal.

ORDER: The appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) Denver, CO

Date: MAR 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Suzan deSeguin-Hons, Esquire

ON BEHALF OF DHS: Aminda B. Katz
Assistant Chief Counsel

APPLICATION: Reopening

On December 9, 2015, the respondent submitted a motion to reopen proceedings in which the Board dismissed his appeal on September 11, 2015. The respondent also seeks a stay of removal. The Department of Homeland Security (DHS) opposes the motion. The motion will be denied.

The respondent seeks reopening as he contends that various former attorneys who represented him before the Immigration Judge and this Board (on appeal) provided him with ineffective assistance of counsel.¹ In this regard we note that the Board upheld the Immigration Judge's determination that the respondent was precluded from cancellation of removal as he did not demonstrate the requisite 10 years of continuous physical presence and good moral character. Section 240A(b)(1) of the Immigration and Nationality Act; 8 U.S.C. § 1229b(b)(1).

In order to support reopening of the proceedings based on a claim of ineffective assistance of counsel, a motion must be supported by: the aggrieved party's affidavit setting forth the agreement that was entered into with former counsel and what counsel did or did not represent to the respondent in this regard; evidence that former counsel was informed of the allegations and allowed the opportunity to respond; and evidence the aggrieved party filed a complaint with

¹ The respondent reports that he was provided ineffective assistance by: Marylu Cianciolo (who initially represented him before the Immigration Judge and who owns the law firm where several of his other representatives worked), Glenys Spence (she represented the respondent at his merits hearing on June 11, 2007, and filed his Notice of Appeal), and Catharine (Bull) Davies (who represented the respondent before the Immigration Judge following a Board remand). Three other attorneys also appeared on the respondent's behalf during his proceedings, two of whom have been disbarred (Patrick Beasley and Ryan Adair), and a third, Bernadette McGuire, appeared with the respondent at one hearing which was continued with no testimony being taken (EOIR Form-44, pgs. 1-2; Motion, Tabs 5-9). The respondent reports that Ms. Spence has not maintained her bar membership. The respondent's claim of ineffective assistance focuses on Ms. Cianciolo, Ms. Spence, and Ms. Davies.

appropriate disciplinary authorities, and if not, why not. *Mickeviciute v. INS*, 327 F.3d 1159, 1161 n. 2 (10th Cir. 2003); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

We initially note that the respondent has not complied with the procedural requirements for a claim of ineffective assistance of counsel, as outlined in *Matter of Lozada*. The respondent has submitted EOIR-44 forms with respect to Ms. Spence, Ms. Cianciolo, and Ms. Davies (Motion, Tabs 5-7). However, such submissions are insufficient to demonstrate compliance with the requirement in *Matter of Lozada* that the “appropriate disciplinary authorities” have been informed of the respondent’s allegations of error. Rather, the appropriate disciplinary authority would be the bar authority in the state in which the attorney is barred.

The EOIR Disciplinary Counsel does not have the authority to expel, disbar, or otherwise suspend an attorney from the practice of law in all venues, unlike state bar authorities. Rather, any adverse action taken in response to an EOIR-44 pertains solely to matters within the jurisdiction of EOIR. Such a limitation on the consequences of potentially significant breaches of professional conduct is not in conformance with the purpose of the *Lozada* requirement at issue, which is intended to “deter meritless claims of ineffective representation,” and highlight “the standards which should be expected of attorneys who represent persons in immigration proceedings, the outcome of which may, and often does, have enormous significance for the person.” *Id.* at 639-40. As the respondent has not submitted any evidence that he has filed a complaint against any of the attorneys he cites with the appropriate disciplinary authority, he has not complied with the requirements enumerated in *Lozada*.

Similarly, although Mr. Beasley and Mr. Adair have both been disbarred, this does not exempt the respondent from the requirement that he notify them of any allegation of ineffective assistance, and provide them an opportunity to respond thereto. This is particularly true with respect to Mr. Beasley, who filed the initial brief on appeal. At that juncture Mr. Beasley had the opportunity and, indeed, the obligation to raise all allegations of error, including those relating to the respondent’s former representatives. As such, the respondent has not complied with the requirements for a claim of ineffective assistance of counsel with respect to either of these counsels, and reopening on this basis is not warranted.

We additionally note that we agree with the DHS’ contention that the respondent’s conviction for solicitation for prostitution in violation of Denver Municipal Code § 38-158 is a crime involving moral turpitude (DHS Br. at 3-4).² Conviction of a crime involving moral turpitude renders a respondent inadmissible and, therefore, ineligible for cancellation of removal. *Garcia v. Holder*, 584 F.3d 1288, 1289 (10th Cir. 2009); see also sections 212(a)(2)(A)(i)(I), 240A(b)(1)(C) of the Act.

² A criminal history chart submitted by the respondent reflects that he was convicted of two different prostitution-related offenses on (b) (6) 2002, both falling under different subsections of section 38-158 (identified by the respondent as “any act of prostitution” and “performing act of prostitution”).

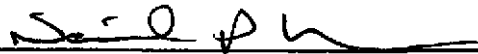
The circuit where this case arises employs the categorical approach when determining whether a state conviction is a crime involving moral turpitude. *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1267 (10th Cir. 2011). As such, the court “looks only to the statutory definition of the offense and not to the underlying facts of the conviction to determine whether the offense involves moral turpitude.” *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011). “Moral turpitude refers to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and duties owed between man and man, either one's fellow man or society in general.” *Id.*; see e.g., *Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007); *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

The Board has long viewed prostitution-related crimes as morally turpitudinous. See, *Matter of Lambert*, 11 I&N Dec. 340, 342 (BIA 1965) (holding that “renting rooms with knowledge that the rooms were to be used for the purpose of lewdness, assignation or prostitution were for crimes involving moral turpitude”); *Matter of A-*, 5 I&N Dec. 546, 549 (BIA 1953) (“[T]he conducting of a brothel is a form of commercial vice involving the practice of immorality for hire, which is accompanied by an evil intent and involves moral turpitude.”); *Matter of W-*, 4 I&N Dec. 401, 402 (BIA 1951) (“It is well established that the crime of practicing prostitution involves moral turpitude.”); *Matter of S-L-*, 3 I&N Dec. 396, 397, 398 (BIA 1948) (holding that “procur[ing] a female inmate for a house of prostitution” involves moral turpitude because (1) it “is a crime in which assistance and aid is given to the carrying on of the business of prostitution” and (2) “[i]t is so far contrary to moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, and is deprived of social recognition by the community”); *Matter of P-*, 3 I&N Dec. 20, 22 (BIA 1947) (concluding that the crime of “keeping a house of ill-fame ... palpably involves moral turpitude”). The respondent has not alleged that these two offenses do not implicate elements of prostitution, or that his conduct was intended for anything other than the express purpose of facilitating the act of prostitution. As such, we agree that the respondent has been convicted of at least one crime involving moral turpitude and is, therefore, inadmissible. See, e.g., *Perez v. Lynch*, 2015 WL 6743572, at 2 (10th Cir. Nov. 5, 2015); *Florentino-Francisco v. Lynch*, 611 F. App'x 936, 938 (10th Cir. 2015) (citing *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012) (“[s]oliciting an act of prostitution is not significantly less base, vile, and depraved than engaging in an act of prostitution”).

The respondent argues that he has not been convicted of a crime involving moral turpitude, citing the definition of a crime involving moral turpitude contained in section 237(a)(2)(A)(i)(II) of the Act, which only applies to crimes for which a sentence of one year or longer may be imposed. However, his reliance on this statutory provision is unavailing as that section relates to determining whether an individual is deportable, not whether he is inadmissible, which is a separate inquiry. Therefore, since the respondent is inadmissible, he is statutorily ineligible for cancellation of removal, and any error by prior counsel is not prejudicial. See *United States v. Aguirre-Tello*, 353 F.3d 1199, 1208–09 (10th Cir. 2004) (proof of prejudice requires that there was “a reasonable likelihood” the outcome would have been different were it not for the allegedly ineffective assistance); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 n. 2 (10th Cir. 1999) (“[A]n alien must show that his counsel's ineffective assistance so prejudiced him that the proceeding was fundamentally unfair.”). This further supports a finding that reopening based on a claim of ineffective assistance of counsel is not appropriate.

In sum, we find that reopening is not warranted. As such, the following order shall be entered.

ORDER: The motion is denied.

A handwritten signature in black ink, appearing to be "S. Q. D. W.", written over a horizontal line.

FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) – Miami, FL

Date:

NOV 20 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alberto A. Cayetano, Esquire

APPLICATION: Reopening

This case was last before the Board on March 13, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision finding the respondent mentally competent and denying his applications for (b) (6). On June 12, 2015, the respondent filed a motion to reopen. The motion will be denied.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

In our decision, we upheld the Immigration Judge's determination finding the respondent mentally competent. The Immigration Judge applied the framework set forth in *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011), in assessing the respondent's competency. He considered the mental health records submitted by the respondent (Exh. 6), which reflect that the respondent is being treated for schizophrenia and was hospitalized for one night in 2011, as well as his personal observations of the respondent during their interactions in court. The Immigration Judge concluded that the respondent "has shown an ability to understand the nature of these proceedings" based on his ability to testify responsively to questions posed (Tr. at 50). The respondent also confirmed that he was taking his medication (Tr. at 38), and that he no longer required regular therapy sessions (Tr. at 39-40).

Moreover, the Immigration Judge noted that safeguards were in place to protect the respondent's right to a fair hearing (I.J. at 3). The respondent was, and continues to be, represented by counsel. See *Matter of M-A-M*, *supra*, at 481 (legal representation is an important safeguard in cases of mental incompetency). Furthermore, the Immigration Judge granted multiple continuances to enable him to obtain a mental health evaluation. *Matter of M-A-M*, *supra*, at 481 (where an alien's mental competence is at issue, Immigration Judges can continue proceedings to allow for further evaluation of competency or an assessment of changes in the respondent's condition). We also noted that the respondent's mother testified on the respondent's behalf. See *id.* at 483 (the appearance of a family member who can assist the alien and provide information is a potential safeguard).

In support of his motion to reopen, the respondent has submitted additional mental health records, dating from February through June 2015. However, consideration of this evidence would not change the result in this case. The records, which reflect that the respondent is being treated for schizophrenia, are cumulative of the mental health information which was already considered by the Immigration Judge. The most recent record submitted with the motion states that the "current regimen appeared to have controlled the severity of the psychiatric symptoms" (Motion Exh. June 8, 2015, at 1). The additional records do not indicate clear error in the Immigration Judge's finding that the respondent understood the nature of the proceedings, was able to consult with his attorney, and had a reasonable opportunity to examine and present evidence and cross-examine witnesses at the hearing. *Matter of M-A-M-*, *supra*, at 479. See also, *Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015) (competency is a finding of fact that the Board reviews for clear error). The record before the Immigration Judge was sufficient to support his finding of competency, and the additional evidence submitted with the motion does not meaningfully change the calculus in this case. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (a party who seeks a remand or to reopen proceedings bears a "heavy burden" of proving that if proceedings were reopened, the new evidence would likely change the result in the case).

Accordingly, the following order will be entered.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

FEB 18 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

The respondent is a native and citizen of Belize. We found him ineligible for a waiver of inadmissibility, under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), and consequently ineligible for adjustment of status under section 245(a) of the Act, on April 2, 2014. The respondent's December 18, 2015, motion to reopen, to which the Department of Homeland Security (DHS) has not responded, will be denied.

The respondent's motion sets out his wish to apply for relief based on (b) (6). The respondent asserts that he was (b) (6) at the removal hearing. The motion is untimely, unless an exception applies. Section 240(c)(7)(C)(i) of the Act; 8 C.F.R. § 1003.2(c)(2).¹ The time limit does not apply to motions to reopen "...based on changed country conditions arising in the country of nationality. . . if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii).

We find, however, that the respondent's lawful removal to Belize affects his eligibility for the relief he now seeks through this untimely motion. Once the respondent was removed, he became ineligible to seek (b) (6) under section (b) (6) of the Act, which provides that an alien "who is physically present in the United States" may apply for (b) (6). See (b) (6) (4th Cir. 2009) ("Although [the respondent] correctly asserts that the BIA has jurisdiction to entertain his motion [despite his removal], the BIA did not abuse its discretion in denying relief based on the statutory requirement that one must be present in the United States to be eligible for (b) (6). Because (b) (6) was removed pursuant to a valid order of removal, he no longer can pursue his (b) (6) application").² The respondent is, in any event, ineligible for (b) (6), having been convicted of an aggravated felony. Sections (b) (6) of the Act.

¹ The respondent was removed to Belize on January 5, 2016, after we denied a request for a stay of removal on December 31, 2015. The United States Court of Appeals for the Ninth Circuit has held that the Board has jurisdiction to consider a statutory motion to reopen even though the respondent has been removed. See *Toor v. Lynch*, 789 F.3d 1055 (9th Cir. 2015). We will consider the respondent's motion on the merits.

² Individuals outside the United States must apply for (b) (6) status under the United States (b) (6).

(b) (6)

As for (b) (6) or (b) (6), these forms of relief require presence in the United States because they act to preclude the removal of an alien to a certain country. See section (b) (6) of the Act (providing that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's (b) (6) in that country"); (b) (6). The respondent in this case is no longer in this country such that his removal to any particular country could be precluded. Thus, the respondent cannot qualify for the relief he seeks.

The pending motion will, therefore, be denied.

ORDER: The untimely motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date: FEB 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Tatiana S. Aristova, Esquire

APPLICATION: Reopening

This matter was last before the Board on September 3, 2015, when we dismissed the respondent's appeal. The respondent has filed a timely motion to reopen. The Department of Homeland Security has not responded to the motion. The motion will be denied.

In the motion, the respondent argues that his proceedings should be reopened based on ineffective assistance of counsel by attorney Alfredo O. Allen, who represented him at hearing and on appeal. The respondent also argues that his proceedings should be reopened (b) (6) arising in the country of nationality. Section (b) (6) of the Immigration and Nationality Act, (b) (6). We will address these arguments in turn.

We will first address the respondent's arguments regarding ineffective assistance of counsel. The respondent argues that he (b) (6) to Uzbekistan, because he has lived in the United States for (b) (6), as required in the Uzbekistan citizenship law dated 1992 (Motion Exh. 1, at 1; Motion Exh. 6). He argues that attorney Allen provided ineffective assistance because he did not search the Uzbekistan law and did not make this argument at his (b) (6) hearing (Motion¹). He argues that he notified his ineffective assistance of counsel claim to attorney Allen and received a reply from him (Motion Exhs. 4-5).

As a threshold matter, the respondent did not show that he has complied with all the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), by filing a bar complaint against attorney Allen, and did not explain why he could not do so. The respondent's statement submitted with the motion, which states that "I . . . request that my prior attorney be disciplined by the BIA" (Motion Exh. 1, at 2), does not constitute a valid bar complaint contemplated in *Matter of Lozada*, and the respondent has not explained why he could not submit an actual

¹ The respondent's motion was not paginated as required in *Board of Immigration Appeals Practice Manual*, § 3.3(c)(iii) at 40 (Jul. 27, 2015) ("Briefs and other submission should *always* be paginated").

complaint to the Bar Counsel of the Executive Office for Immigration Review or any state disciplinary authority. Since the respondent failed to comply with the requirements set forth in *Matter of Lozada, supra*, the motion based on ineffective assistance of counsel will be denied.

Even if we were to examine the merits of the respondent's ineffective assistance of counsel claim, we would not find that reopening is warranted. The respondent's ineffective assistance of counsel claim, as noted above, is based on attorney Allen's alleged failure to make (b) (6) claim based on the respondent's failure to (b) (6) in the United States. The citizenship laws of Uzbekistan, a copy of which was submitted, provides for (b) (6)

(b) (6) (Motion Exh. 6, Art. 21(2)²). However, the law also provides that the (b) (6) is considered effective "from the day the Decree by the President of the Republic of Uzbekistan is issued" (Motion Exh. 6, Art. 21). The respondent's evidence does not show whether or when such a decree was issued in his case, and the respondent does not explain under what circumstances a person is regarded to be (b) (6) within the meaning of this provision. More importantly, the respondent does not point to any provision of this law setting forth a (b) (6). The respondent also has not shown that there was any evidence, at the time of his hearing in June 2014, that anyone (b) (6) to Uzbekistan because (b) (6), such that it could have been presented at his hearing.³ In addition, the respondent has not argued or shown (b) (6)

See section (b) (6)

The respondent, therefore, did not show that there is a reasonable probability that the outcome of his proceedings would have been different if attorney Allen had made this argument. Since the respondent did not show prejudice, the motion based on ineffective assistance of counsel will be denied. See *Dakane v. Attorney General*, 399 F.3d 1269, 1274 (11th Cir. 2005)

² While the citizenship law of Uzbekistan was submitted without a valid certificate of translation, we will assume the reliability of this document for purposes of this decision (Motion Exh. 6).

³ As discussed below, the respondent submitted Internet articles (b) (6) to that country. These articles are dated (b) (6) 2014 and (b) (6) 2015, respectively, thus they could not have been discovered or presented at the respondent's previous hearing in June 2014 (Motion Exhs. 7-8). Furthermore, contrary to the respondent's suggestion, the articles do not show whether (b) (6) (*id.*).

As to the respondent's claim in his statement that he "certainly will be (b) (6) (b) (6)" (Motion Exh. 1, at 1), the record shows that the respondent was duly admitted to the United States at New York, NY, in 2005 as an H-2B non-immigrant (I.J. at 1; Exh. 1, at 3).

(holding that an alien claiming ineffective assistance of counsel must show prejudice, meaning that there is a reasonable probability that, but for the attorney's claimed error, the outcome of the proceedings would have been different).

We will next address the respondent's arguments (b) (6). The respondent argues that, in 2015, the Uzbekistan government has (b) (6), such that Norway and other European countries (b) (6) Uzbek citizens to that country, as shown in the articles submitted (Motion Exhs. 6-8).

The evidence submitted by the respondent is insufficient to show (b) (6) in Uzbekistan. The article submitted shows that (b) (6) in Norway based on false claims or using false identity or documents and returned to Uzbekistan, were (b) (6), and (b) (6) while in Norway (Motion Exh. 8). Although the article suggests that these individuals were in fact (b) (6), they do not clearly show (b) (6), and the respondent does not sufficiently explain how he is (b) (6). To the extent there are (b) (6) in Uzbekistan, this is similar to (b) (6) that existed at the time of the respondent's previous hearing, as shown in part in the documents submitted at the time (Exh. 3-D, -E), rather than (b) (6) since that time. The respondent, therefore, did not show that (b) (6) of Uzbekistan is material to his claims for (b) (6) or related forms of relief, or that a different outcome is warranted in his case. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Based on the above, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date: APR 26 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTIONS

ON BEHALF OF RESPONDENT: Candace L. Jean, Esquire

APPLICATION: Reopening; reconsideration

The respondent is a native and citizen of Mexico. On February 3, 2016, the Board dismissed the respondent's appeal. On March 1, 2016, the respondent filed a timely motion to reopen and reconsider. The motions are denied.

Although the respondent's motion is captioned a motion to reconsider, he did not identify any material error of fact or law in our prior decision. 8 C.F.R. § 1003.2(b); *Matter of O-S-G*, 24 I&N Dec. 56 (BIA 2006). As such, the motion to reconsider is denied.

A motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material" and "must be accompanied by the appropriate application for relief and all supporting documentation." 8 C.F.R. § 1003.2(c)(1). A motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing" *Id.* The movant must also establish prima facie eligibility for the relief sought, *INS v. Doherty*, 502 U.S. 314, 319 (1992); *INS v. Abudu*, 485 U.S. 94, 104-05 (1988), and satisfy the "heavy burden" of establishing that if the proceedings were reopened, with all the attendant delays, the new evidence would likely change the result in the case. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

The respondent seeks reopening based on additional evidence obtained since the Immigration Judge's hearing. He contends that his wife is suffering neck and lower back pain, as well as some other pain, that makes it difficult for her to move. He also contends that his three United States children have been adversely affected by his immigration problems and have developed emotional problems. He also argues that his oldest son continues to have learning disabilities. In support of his arguments, he has submitted a new psychological evaluation and documentation as to his wife's problems. Based on the additional evidence, he seeks reopening and a remand for further consideration of his cancellation of removal application under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The motion is denied.

The additional evidence submitted with the motion does not demonstrate prima facie eligibility such that his United States citizen children's needs would be unmet or that the

hardship to them would be substantially beyond that which would ordinarily be faced by qualifying relatives upon removal of an alien. Section 240A(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(D); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). His oldest son has had learning disabilities for many years, and his issues have been addressed within the school system (Notice of Filing dated 11/13/12 at Tab D; IJ at 9-10). Prior to the Immigration Judge's hearing, his IQ was within the normal range, but he tested below average in a variety of subtests. The respondent's oldest son's primary language, identified areas of disability, and ethnic background were considered in the selection of evaluation instruments and their interpretation (Notice of Filing dated 11/13/12 at Tab D, p. 134). But the respondent did not demonstrate that his oldest son's learning difficulties would be worsened or exacerbated by relocating to Mexico (IJ at 9-10 (unpaginated)).

The new evaluation attached to the motion is by a different psychologist. She used a different test to assess the respondent's son's IQ, but did not explain why she chose this test (WISC-IV), as opposed to the test employed by the school psychologist based on the respondent's oldest son's primary language, disabilities and ethnic background. We therefore give the WISC-IV test results less weight. The comparison of scores from (b) (6) test in 2011 to the current test indicate that the respondent's oldest son improved in some areas and fell in others. The new psychologist opines that the respondent's removal would cause hardship to his oldest son because he may not be likely to receive the treatment he needs. However, this was an argument presented, and rejected, by both the Immigration Judge and the Board, and the additional evidence would not change the result in this case.

The new evaluation also opines that each child is suffering from anxiety and a variety of other emotional issues related to their father's immigration problems. Such emotional problems are hardships that would ordinarily be expected from a family member's removal from the United States. The respondent contends that his wife's injuries will prevent her from working and supporting the children in the United States so the children will have to return to Mexico with him. However, the Immigration Judge found that the respondent would return to Mexico with his children, and that it was unclear whether their mother would also return to Mexico (IJ at p. 5 (unpaginated) n. 2 and p. 11 (unpaginated) n. 4). As such, their mother's recent injuries would not affect the outcome of this proceeding.

Last, based on a recent travel warning, the respondent contends that the worsening crime and violence in Mexico is a basis for reopening. While we are sympathetic with his concerns, his ongoing concerns with violence in Mexico would not, coupled with the other evidence in the record, demonstrate prima facie eligibility such that the respondent's removal would result in exceptional and extremely unusual hardship. As such, the motion does not demonstrate that the additional evidence would likely change the result in this case. *Matter of Coelho, supra*. Accordingly, the following order shall be issued.

ORDER: The motions are denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date: JUN 09 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Veronica Barba, Esquire

APPLICATION: (b) (6)

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated January 26, 2016, which denied his application for (b) (6). See (b) (6). The appeal will be dismissed.¹

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent entered the United States with his mother when he was (b) (6) years old (I.J. at 4). He and his mother both testified that his father (b) (6) in Mexico and in the United States (I.J. at 4-6; Tr. at 127-31). In the United States, when the respondent was about (b) (6) years old and his parents were separated, (b) (6) for about 30 days (I.J. at 4; Tr. at 89-93, 109, 132). Subsequently, (b) (6) in California (b) (6), and the respondent (b) (6) (I.J. at 4, 7; Tr. at 89, 136). His father is now in Mexico, while his mother is a lawful permanent resident of the United States (I.J. at 2; Tr. at 85, 136, 159). The respondent (b) (6) Mexico because he believes (b) (6) (I.J. at 5; Tr. at 117).

The respondent also (b) (6) (I.J. at 5; Tr. at 139). He was (b) (6)

¹ The respondent has been identified as a class member in the class action lawsuit class action lawsuit of *Franco-Gonzalez, et al. v. Holder*, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014). In accordance with the order implementing the permanent injunction in that case, the Immigration Judge conducted a Judicial Competency Inquiry and concluded that the respondent is not mentally competent to represent himself in removal proceedings (I.J. at 2, 10). In light of this determination, the Immigration Judge appointed a qualified representative for the respondent (I.J. at 2, 10). The respondent, who continues to be represented, does not address the issue of his competency or representation on appeal.

(b) (6)

(b) (6) (I.J. at 2, 13; Exh. 10 at 231; Respondent's Br. at 6-7). He takes (b) (6) (I.J. at 5, 8). The respondent claimed that he would (b) (6) in Mexico because he will (b) (6), (b) (6) (I.J. at 14).

The Immigration Judge found the respondent and his mother to be credible, but denied the respondent's application because he did not meet his burden of proof (I.J. at 11, 12). We adopt and affirm the Immigration Judge's decision. See *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

First, we affirm the Immigration Judge's determination that the respondent did (b) (6) in the country of removal, Mexico (I.J. at 12). As noted by the Immigration Judge, this case presents sympathetic facts (*Id.*). However, the respondent did not testify to (b) (6) in Mexico, and the psychological evaluation that he submitted for the record did not indicate that he (b) (6) in Mexico (I.J. at 12). He otherwise did not set forth facts which (b) (6) in Mexico within the meaning of the Act.

On appeal, the respondent argues that the Immigration Judge erred in discounting the (b) (6) (Respondent's Br. at 3, 11). We distinguish the case referred to in the respondent's brief, (b) (6) (9th Cir. 2012), in which the court decided that (b) (6) because it (b) (6) (Respondent's Br. at 11). Here, the respondent does not make any direct assertions or provide any evidence that he was (b) (6) in Mexico (Respondent's Br. at 11-12). We also consider that his mother was able to (b) (6) to the United States while the respondent was quite young. Cf. (b) (6) (2d Cir. 2006) (directing the Board to consider (b) (6), in relation to the (b) (6)).

As the respondent has not (b) (6), he is not entitled to a (b) (6)

The Immigration Judge correctly determined that the respondent did not demonstrate a nexus (b) (6) (I.J. at 13). See section (b) (6) of the Act; (b) (6) (defining "(b) (6)" as, in relevant part, (b) (6)). The respondent claims (b) (6) Mexico (I.J. at 13, 15; Tr. at 166; Respondent's Br. at 21-22). An applicant for (b) (6) (BIA 2014); (b) (6) (BIA 2014).

(b) (6)

The (b) (6) for purposes of (b) (6) (I.J. at 15; Respondent's Br. at 21). Including the (b) (6), as (b) (6). A (b) (6).

The Immigration Judge also did not clearly err in finding that the respondent's (b) (6) (BIA 2014) (I.J. at 15). In that case, we ruled that, depending on the facts and evidence in an individual case, (b) (6) that forms the basis of a claim for (b) (6). We found that all of those factors—(b) (6) in Guatemalan (b) (6) *Id.* at 393-94. (b) (6) is not sufficiently similar to the respondent's (b) (6), dictates the outcome in the instant case.

As the Immigration Judge concluded, the respondent's (b) (6) and is also not a (b) (6) (I.J. at 15-16). Its (b) (6) (9th Cir. 2013) (holding that (b) (6), were (b) (6).

Even if the respondent's (b) (6) for purposes of (b) (6), we further agree with the Immigration Judge that he did not demonstrate that he has (b) (6) (I.J. at 13-14).

First, the respondent did not establish that his (b) (6) (I.J. at 13). The respondent has (b) (6) in 10 years (I.J. at 13). On appeal, the respondent contends that the Immigration Judge erred in relying on the fact that other family members, such as his brother, have (b) (6) (I.J. at 13). He argues that his brother is not in the (b) (6) (Respondent's Br. at 17). He also contends that (b) (6) that he has a (b) (6) (Respondent's Br. at 18). We are not persuaded by these arguments, as the respondent points to no evidence supporting his claim that (b) (6) him.

Second, the Immigration Judge correctly found that the respondent's speculation concerning the chain of events in Mexico (b) (6) was not supported by the evidence (I.J. at 13-14; Respondent Br. at 18-19). There is no evidence that (b) (6). As the Court of Appeals for the Ninth Circuit noted:

(b) (6)

(b) (6)
That is true not only
for (b) (6), but for
many who (b) (6).
If someone (b) (6)
but also (b) (6) in a
(b) (6) and there is no basis to conclude that (b) (6)
(b) (6). As the BIA and the courts have recognized, an
(b) (6)

(b) (6). Thus, the respondent's (b) (6) application was properly denied on this basis as well.

Because the respondent failed to satisfy the lower burden of proof applicable to (b) (6) he has necessarily failed to establish eligibility for (b) (6), which (b) (6) (BIA 2010); (b) (6) (9th Cir. 2006).

On appeal, the respondent claims that the Immigration Judge erred in not considering whether he is eligible for (b) (6) (Respondent's Br. at 14-15). (b) (6) applicant who has established (b) (6) may nevertheless warrant a discretionary grant of (b) (6) based on either compelling reasons arising (b) (6), or a (b) (6) upon removal to his or her country. (b) (6) (BIA 2012). We decline to remand for consideration of the respondent's request for (b) (6) because he has not (b) (6), as discussed above.

Finally, we affirm the Immigration Judge's denial of (b) (6), based on the same facts (I.J. at 17). The respondent argues that he will (b) (6) (Respondent's Br. at 24), but does not support this claim with references to the record. See (b) (6) (A.G. 2006) (a (b) (6) claim cannot be granted by stringing together a series of suppositions); (b) (6) (9th Cir. 2011) (finding the alien's claim of the (b) (6) to be speculative). Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date: JUN 13 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mackenzie W. Mackins, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: (b) (6)

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's January 15, 2015, decision to deny his application for (b) (6). Sections (b) (6) of the Immigration and Nationality Act, (b) (6). The Department of Homeland Security ("DHS") has not responded to the appeal. The record will be remanded for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, judgment, and discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent conceded his removability (I.J. at 2; Exh. 1; Tr. at 16), and thus the only issue on appeal is his eligibility for relief from removal. The respondent claims that (b) (6) to Mexico (I.J. at 4-5; Exhs. 3-4; Tr. at 52-53). (b) (6) (I.J. at 4-5; Exh. 3 at Tab A; Exh. 4 at Tab D; Tr. at 39-87). The (b) (6) who were (b) (6), and the respondent and his wife believe (b) (6) (I.J. at 4-5; Exh. 3 at Tab A; Exh. 4 at Tab D; Tr. 39-41, 55-58, 137-45, 163-64). (b) (6), the respondent and his wife declined to provide (b) (6) (I.J. at 4-5; Exh. 3 at Tab A; Exh. 4 at Tab D; Tr. at 39-87, 100-21, 133-48). Nevertheless, according to the respondent, (b) (6) in Mexico because (b) (6) (I.J. at 4-5; Exh. 3 at Tab A; Exh. 4 at Tab D; Tr. at 39-87, 100-21, 133-48). On appeal, the respondent contends that the Immigration Judge erred in finding that he did not meet his burden of proof for (b) (6) (Respondent's Brief at 5-12).

(b) (6)

To be eligible for (b) (6), the respondent must demonstrate that he (b) (6) outlined under section (b) (6) of the (b) (6), and that such (b) (6) has been or will be (b) (6). (b) (6) (9th Cir. 2015). Here, the Immigration Judge found the respondent to be credible (I.J. at 12-14). The Immigration Judge additionally determined that (b) (6) the respondent (b) (6) in Mexico (b) (6) the respondent and his family (I.J. at 15).

While the Immigration Judge found that (b) (6) was random, she noted that the respondent and his wife (b) (6) in Mexico due to (b) (6) after the (b) (6) (I.J. at 16-17; Exh. 3 at Tab A; Exh. 4 at Tab D; Tr. 39-87, 98-121, 133-48, 163-64). See (b) (6) (BIA 2014) (noting that a (b) (6) or (b) (6)). Nevertheless, the Immigration ultimately concluded that (b) (6) (I.J. at 16-17). The record indicates that (b) (6) the respondent and his wife (b) (6) (I.J. at 16-17; Exh. 4 at Tab D; Tr. 39-41, 55-58, 98-121, 133-48, 163-64).

Pursuant to intervening authority from the United States Court of Appeals for the Ninth Circuit, the circuit in whose jurisdiction this case arises, the respondent's familial relationship to his wife, who is (b) (6), may be sufficient to bring him within the ambit of a (b) (6) under the Act. See (b) (6) (9th Cir. 2015). In (b) (6) the court held that the Board overlooked the alien's claim that he is a (b) (6).” *Id.* Noting that “the (b) (6),” the court remanded the record to the Board for further consideration of whether the alien's (b) (6) under the Act. *Id.* at 1128.

Insofar as the Immigration Judge did not specifically address this (b) (6), she did not make the necessary findings of fact regarding the respondent's (b) (6). See (b) (6) (BIA 2014) (“The question whether a person is a (b) (6) is a finding of fact that we review for clear error.”). Given our limited fact-finding ability on appeal, see 8 C.F.R. § 1003.1(d)(3)(i), we will remand the record to the Immigration Judge to make these findings in the first instance and to determine what effect, if any, the Ninth Circuit's decision in (b) (6), has on the respondent's application for (b) (6) under section (b) (6) of the Act. On remand the Immigration Judge should further consider the respondent's eligibility for (b) (6) under section

(b) (6)

(b) (6) of the Act and (b) (6) at this time (Respondent's Brief at 12-15). Accordingly, the following orders will be entered.

ORDER: The record is remanded for further proceedings and the entry of a new decision consistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Chicago, IL

Date: OCT 26 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: (b) (6)

This case is before us pursuant to the (b) (6), 2015, order of the United States Court of Appeals for the Seventh Circuit granting the government's unopposed motion to remand for further proceedings. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent's applications were filed after May 11, 2005, they are governed by the provisions of the REAL ID Act.

The Seventh Circuit granted the government's unopposed motion to remand to allow the Board "to consider what effect, if any, the intervening decision in *Matter of L-A-C-*, 26 I&N Dec. 516, 522 (BIA 2015) ("[I]n deciding whether an applicant has met his burden of proof, an Immigration Judge must not place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the claim."), has on the [Board's] consideration of [the respondent's] corroborating evidence" (Government's Motion at 1-2).

In this case, the Immigration Judge noted that he had some credibility concerns and that the respondent's claim "seems implausible" (I.J. at 7), but declined to render an adverse credibility determination (I.J. at 8). Instead, the Immigration Judge denied relief after finding that the respondent failed to carry his burden of proof based on a lack of corroboration (I.J. at 8). The Immigration Judge acknowledged that the respondent did submit a letter from his father, a fine receipt, a (b) (6), and a letter from a (b) (6) (I.J. at 5; Exh. 4, Tabs 3-4, 6, 10; Exh. 5). Nevertheless, the Immigration Judge found that the respondent's corroborative evidence insufficient because his "story seems implausible, and [the] respondent has not submitted the type of meaningful independent corroborative evidence that would support the fact that he (b) (6) in China" (I.J. at 6).

In light of our intervening decision in *Matter of L-A-C-*, we conclude it is necessary to remand this case for further proceedings. In *Matter of L-A-C-*, we held that (b) (6) applicants have the burden to establish their claim without prompting from the Immigration Judge, that an Immigration Judge need not give an applicant advance notice of the specific corroborating

evidence necessary to meet his burden of proof or to provide an automatic continuance for the applicant to obtain such evidence. *Matter of L-A-C-*, *supra*, at 523-24. Further, we held that "the Immigration Judge should weigh all of the evidence provided and consider the totality of the circumstances in determining whether the applicant has met his burden." *Id.* at 522. In this case, the Immigration Judge did not sufficiently address the weight he gave to the corroborating evidence that the respondent did provide, and explain why it was not adequate for the respondent to carry his burden. *Id.*

Thus, the record will be remanded to the Immigration Judge for further proceedings as he deems appropriate, including any necessary fact-finding and development of the record. 8 C.F.R. § 1003.1(d)(3)(iv) (limiting the Board's fact-finding authority). On remand, both parties should have an opportunity to present arguments and updated evidence, including current country conditions. The Immigration Judge should consider the impact of *Matter of L-A-C-* on his determination that the respondent did not meet his burden of proof, and should address the corroborative evidence the respondent did provide. *See also, e.g., Abraham v. Holder*, 647 F.3d 626, 633 (7th Cir. 2011). Further, the Immigration Judge may, if appropriate, make a new credibility determination pursuant to section 208(b)(1)(B)(iii) of the Act, which is supported by specific and cogent reasoning that complies with the REAL ID Act standards as well as the precedents of the United States Court of Appeals for the Seventh Circuit. *Matter of J-Y-C-*, 24 Dec. 260 (BIA 2007); *see also Krishnapillai v. Holder*, 563 F.3d 606, 616-18 (7th Cir. 2009).

We express no opinion regarding the ultimate outcome of these removal proceedings. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings, consistent with the foregoing opinion and the decision of the Seventh Circuit, and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 07 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Elliott Friedman, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: (b) (6); remand

The respondent, a native and citizen of the People's Republic of China, has timely filed an appeal of an Immigration Judge's decision dated February 17, 2015, that denied his application for (b) (6) pursuant to sections (b) (6) of the Immigration and Nationality Act, (b) (6), respectively, as well as (b) (6) pursuant to (b) (6). Subsequently, the respondent filed a "Motion to Reopen" to consider additional evidence and a claim of ineffective assistance of counsel, which we construe as a motion to remand for further proceedings. See 8 C.F.R. § 1003.2(c)(4) (noting that a motion to reopen filed when an appeal is pending before the Board may be deemed a motion to remand for further proceedings). The Department of Homeland Security has not submitted a response to the appeal or the motion. The appeal will be dismissed and the motion will be denied.

We review findings of fact, including the determination of credibility, under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge denied the respondent's (b) (6) application based on his claim of (b) (6) because the respondent was not credible (I.J. at 4-9). There is no clear error in the Immigration Judge's adverse credibility finding. See section (b) (6) of the Act, (b) (6) (9th Cir. 2011) (holding that to overturn an Immigration Judge's adverse credibility finding, the evidence must not only support a contrary conclusion, it must compel it); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error); *Matter of A-S-*, 21 I&N Dec. 1106, 1109-12 (BIA 1998) (noting that because an Immigration Judge has the ability to see and hear witnesses, he or she is in the best position to determine the credibility of such witnesses).

Contrary to the respondent's appellate assertion, the Immigration Judge based her adverse credibility finding on material inconsistencies, omissions, and implausibilities in the respondent's testimony and documentary evidence related to events central to his claim (Respondent's Brief at 12-16; I.J. at 5-7; Exhs. 2, 4B). See [REDACTED] (9th Cir. 2003); [REDACTED] (9th Cir. 2001) (holding that an inconsistency goes to the heart of a claim if it concerns events central to the alien's version of why he was [REDACTED]). Specifically, the Immigration Judge noted that the respondent provided testimony that was inconsistent with his documentary evidence about whether both he and his spouse would [REDACTED], as well as non-persuasive responses when asked about the discrepancy (I.J. at 3-6; Exhs. 2, 4B; Tr. at 30, 32, 60-62). The respondent provided inconsistent testimony about when he discovered that his son's [REDACTED] had not been submitted to the court (I.J. at 7; Exh. 5; Tr. at 37-48).¹ The respondent also provided implausible testimony related to his motivation to come to the United States, and was unable to explain why he could not return to China and live with his spouse and two children in [REDACTED] where they have [REDACTED] in 2003, and where he lived with them from 2003 to 2009 (I.J. at 6-7; Tr. at 29, 58-60, 70-72).

For example, the respondent wrote in his [REDACTED] application statement that [REDACTED] (I.J. at 5; Exh. 2). However, the respondent testified that [REDACTED] (I.J. at 5; Tr. at 30, 32, 60-62). The [REDACTED], 2009, notice that purported to be from the [REDACTED] also stated that *both* of them [REDACTED] (I.J. at 5; Exh. 4B). The 2010 United States Department of State [REDACTED] for China (Department of State Report) indicates that in the case of a [REDACTED] (I.J. at 6; Exh. 4J).

The respondent submitted his son's [REDACTED] at his merits hearing in November 2012, 2 years after he submitted the other supporting documents in his case (I.J. at 7; *see* Exhs. 4, 5). Initially the respondent testified that he first realized that his son's [REDACTED] was missing from the record when the Immigration Judge showed him the submissions to review at the start of his hearing (I.J. at 7; Tr. at 38-39). When the Immigration Judge informed him that the document had been translated the day before his hearing, he testified that he realized the day before the hearing that it was missing (I.J. at 7; Tr. at 39-40). The respondent was unable to explain why such an important piece of evidence was not included with his initial submission (I.J. at 7; Tr. at 87-89). The respondent testified that he acquired a passport from the Chinese government in [REDACTED] 2009, although he had considered coming to the United States since 2003, when his son was born (I.J. at 6; Tr. at 74-75). The respondent testified that he did not obtain a passport for his spouse because it was impossible for both of them to leave the country together

¹ Exhibit 5 was accepted for identification purposes only because it was deemed untimely filed by the Immigration Judge (I.J. at 2; Tr. at 10-12).

(I.J. at 6; Tr. at 77). The respondent also testified that he received (b) (6) on (b) (6), 2009, and received a visa to come to the United States approximately 7 days later on (b) (6) 2009 (I.J. at 7; Exh. 4A; Tr. at 75-76).

When given an opportunity to explain the inconsistencies or clarify the timing of the events, the Immigration Judge properly determined that the respondent provided conflicting and implausible responses (I.J. at 5-7; see Tr. at 37-48, 60-63, 68-69, 74-78, 86-88). See *Garcia v. Holder*, 749 F.3d 785, 790 (9th Cir. 2014) (finding such opportunity was afforded where the Immigration Judge continually asked questions to clarify what the applicant meant by her inconsistent answers). Contrary to the respondent's appellate assertion that he provided valid excuses for the discrepancies and they were, in part, due to language errors or misunderstandings, the Immigration Judge properly considered and rejected the respondent's explanations (Respondent's Brief at 12-15; I.J. at 5-8). See *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091 (9th Cir. 2009) (noting that an Immigration Judge must consider proffered explanations for inconsistencies); see also *Rizk v. Holder*, *supra*, at 1088 (holding that the Immigration Judge may reject an alien's unreasonable or implausible explanation for an inconsistency and rely on that inconsistency for an adverse credibility finding); see also *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (explaining that an Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept an alien's account where other plausible views of the evidence are supported by the record).

To the extent that the respondent argues that the Immigration Judge improperly used general statements from the State Department Report to discredit the respondent's testimony and documentary evidence, we observe that a discrepancy arose between his testimony and documentary evidence, and his written application (Respondent's Brief at 13; I.J. at 5-6; Exhs. 2, 4B). Hence, the Immigration Judge properly determined that State Department Report did not support the respondent's assertion that both he and his spouse would be (b) (6), and undermined the respondent's claim (I.J. at 6). See *Xiao Lan Zheng v. Ashcroft*, 397 F.3d 1139, 1143-44 (9th Cir. 2005) (noting that an Immigration Judge may consider generalized reports, such as the State Department's Country Reports, in evaluating a petitioner's credibility).

We disagree with the respondent's appellate assertion that the Immigration Judge engaged in impermissible speculation regarding the respondent's reasons for leaving China (Respondent's Brief at 13-14). Rather, the Immigration Judge reasonably questioned the respondent's underlying claim that (b) (6) him due to the inconsistencies in the evidence, as well as his testimony that his spouse has remained living in China for 9 years since their son's (b) (6) (I.J. at 5-8; Exhs. 2, 4B, 4J; Tr. at 58-60, 70-72). The respondent was also unable to adequately explain why he could not get a passport for his spouse or why he would (b) (6) with his spouse and children in the apartment in (b) (6) (I.J. at 6; Respondent's Brief at 13-14). See *Cui v. Holder*, 712 F.3d 1332, 1337-38 (9th Cir. 2013) (describing the alien's testimony as "problematic" when it is vague and evasive about material parts of his claim).

Even accepting the respondent's argument that there was no prejudice from the delay in the submission of his son's (b) (6), the Immigration Judge appropriately considered the

totality of the record to conclude that the respondent did not present a credible claim (Respondent's Brief at 14-15; I.J. at 7). See section (b) (6) of the Act (requiring the trier of fact to consider the "totality of the circumstances, and all relevant factors" when determining an applicant's credibility); *Shrestha v. Holder*, 590 F.3d 1034, 1043 (9th Cir. 2010). The Immigration Judge also did not require that the respondent submit corroborating evidence (Respondent's Brief at 15-16, 18). Rather, the Immigration Judge determined that the evidence that the respondent submitted undermined his credibility (I.J. at 5-9). See (b) (6) (9th Cir. 2006) (noting that an Immigration Judge may deny (b) (6) application based on a finding that the documentary evidence is not credible, if the adverse credibility finding is appropriate); see also *Don v. Gonzales*, 476 F.3d 738, 742 n.7 (9th Cir. 2007) (noting that questionable documentary evidence can support an adverse credibility determination).

In sum, there is no clear error in the Immigration Judge's adverse credibility finding. Furthermore, a persecution claim that lacks veracity cannot satisfy the burdens of proof and persuasion necessary to establish eligibility for (b) (6). See (b) (6) (BIA 1995).

There is also no clear error in the Immigration Judge's finding that the respondent did not establish that (b) (6)

(b) (6) to China, and we affirm her determination on this issue for the reasons provided in the decision (I.J. at 9-10). See (b) (6) (9th Cir. 2012) (holding that an Immigration Judge's determination as to the (b) (6) is a question of fact that we review for clear error). The respondent testified that his spouse has remained living in China (b) (6) since (b) (6) in together before the respondent left for the United States in 2009 (I.J. at 10; Tr. at 70-72).

A motion to reopen must state new, material facts that were previously unavailable to the respondent. 8 C.F.R. § 1003.2(c)(1). The motion may be denied if the new evidence would not likely change the result in the case. *Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1992).

A motion based upon a claim of ineffective assistance of counsel requires (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The respondent has not complied with any of these requirements (Respondent's Motion to Reopen). See *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999). These requirements are in place to allow the Board a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before us, and to "discourage baseless claims." See *Matter of Lozada*, *supra*, at 639.

Moreover, ineffective assistance of counsel is not plain on the face of the record. *See Reyes v. Ashcroft*, 358 F.3d 592, 596-99 (9th Cir. 2004) (explaining that strict compliance with *Matter of Lozada*, *supra*, may not be required where ineffective assistance of counsel is plain from the administrative record). The delay in the submission of the respondent's son's (b) (6) does not establish ineffective assistance of counsel, and the respondent has not shown that the additional evidence he submitted with his motion would likely change the result in his case (Respondent's Brief at 17-19; Motion to Reopen, Attachments at 1-15). *See Matter of Coelho*, *supra*.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: JUN 09 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kenneth C. Goodsell, Esquire

APPLICATION: (b) (6)

The respondent has appealed an Immigration Judge's decision of August 18, 2014, denying his applications for (b) (6) under sections (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6). The Department of Homeland Security ("DHS") has not submitted a brief opposing the appeal. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent submitted his applications after May 11, 2005, they are governed by the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42, 43 (BIA 2006).

The respondent argues that he has been, and will be, (b) (6) on (b) (6). The Immigration Judge denied the respondent's applications for relief based on an adverse credibility finding. Under the REAL ID Act, an adverse credibility finding must be based on consideration of the totality of the circumstances and all relevant factors, including the responsiveness of the applicant, the inherent plausibility of the applicant's account, the consistency between the applicant's written and oral statements, and the internal consistency of each such statement, without regard to whether an inconsistency goes to the heart of the applicant's claim. Section (b) (6) of the Act.

In support of the adverse credibility finding, the Immigration Judge cited to numerous inconsistencies and discrepancies in the record between the respondent's testimony, (b) (6) application, written declarations, and documentary evidence (I.J. at 3-6). However, the respondent was never confronted with, or given an opportunity to explain, these discrepancies at any time during the hearing (Resp. Br. at 10, 12, 14-15).¹ See *Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (Immigration Judge must give alien the opportunity to explain an

¹ Although the respondent's attorney was asked to confirm that the respondent's first statement asserts that he (b) (6) while his amended statement specifies that he (b) (6) (Tr. at 28-33), the respondent was never asked to provide an explanation.

apparent inconsistency before relying on it in making an adverse credibility finding); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1092 (9th Cir. 2009) (Immigration Judge could not properly base adverse credibility determination on inconsistencies where alien was not given a chance to reconcile them).

In light of the foregoing, the Immigration Judge's adverse credibility finding cannot be upheld on the record before us. Thus, we will remand the record to allow the respondent an opportunity to explain the inconsistencies noted by the Immigration Judge. If, on remand, the respondent is ultimately found to be credible, the Immigration Judge must comply with the notice and opportunity requirements of *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011) before relying on the lack of corroboration (I.J. at 4-5). See *Ren v. Holder*, *supra*, at 1093 ("If a credible applicant has not yet met his burden of proof, then the IJ may require corroborative evidence," so long as the applicant is given notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available."); *Zhi v. Holder*, 751 F.3d 1088, 1095 (9th Cir. 2014) (remanding record for reconsideration of the adverse credibility finding, and advising that "[i]f additional corroborative evidence is deemed necessary for Zhi to carry his burden of proof, then the notice requirements in *Ren* apply.").

Accordingly, the following order will be entered.

ORDER: The record will be remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Kansas City, MO

Date:

MAY 13 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Allan H. Bell, Esquire

ON BEHALF OF DHS: Melissa L. Castillo
Assistant Chief Counsel

APPLICATION: Reopening

The respondent is a (b) (6)-year-old native and citizen of Kenya. Her case was last before the Board on May 23, 2014, when we dismissed her appeal from the Immigration Judge's July 13, 2012, decision denying her request for a continuance to await the approval of the visa petition that was filed on her behalf by her United States citizen spouse. On February 24, 2016, the respondent filed the present request for reopening. The motion will be denied.

The respondent's motion is untimely filed and is denied on that basis. *See* section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The motion has not been shown to qualify for any exception to the time limitations imposed by law on motions to reopen removal proceedings.

The respondent has not sufficiently shown that the (b) (6) relating to the (b) (6) in Kenya have (b) (6) since the time of her hearing. Both the respondent's brief and the proffered evidence, including the country information and the affidavits from the respondent's father in Kenya and her brother and her sister-in-law both of whom reside in this country, reflect that (b) (6) is a (b) (6) in Kenya, although the (b) (6). Indeed, the respondent's father averred that (b) (6) is a "deep tradition within our people." (Respondent's father's affidavit dated (b) (6), 2016). Further, the respondent has stated that she originally left Kenya to (b) (6) to that country because she was aware that her parents were (b) (6) regardless of her age upon her return (Respondent's affidavit; Respondent's father's affidavit dated (b) (6) 2016). On this record, it is clear that evidence relating to the respondent's (b) (6) was available prior to her July 2012, hearing before the Immigration Judge. *See* 8 C.F.R. § 1003.2(c)(1).

Moreover, without some evidence of reliability, we give little weight to the alleged affidavits from the respondent's father in Kenya and her brother and her sister-in-law regarding the likelihood that the respondent would be (b) (6) in Kenya at this point. Such evidence consists of copies of documents that were created in support of the present request for

reopening, were not subjected to cross examination, and are unsupported by independent evidence. See, e.g., *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010) (affording little weight to unauthenticated copies of documents that failed to identify the authors, who were not subject to cross examination, and were obtained for the purposes of the hearing), *rev'd in part*, *Huang v. Holder*, 677 F. 3d 130 (2d Cir. 2012); *Matter of S-Y-G-*, 24 I&N Dec 247, *supra*, at 253 (BIA 2007) (requiring genuine, authentic, and objectively reasonable evidence for reopening).

On this record, the respondent has not provided an adequate basis to excuse the untimeliness of the present motion. Nor do we find reopening warranted in the exercise of discretion under the Board's sua sponte authority. See, e.g., *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). We acknowledge the respondent's concern over returning to Kenya, but there appears to be no basis for reopening outside of the time constraints imposed by law.

Accordingly, we will enter the following order.

ORDER: The respondent's motion and related request of a stay of removal are denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) Las Vegas, NV

Date:

APR - 7 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sylvia L. Esparza, Esquire

APPLICATION: Reopening

This case was last before the Board on September 18, 2015, when we dismissed the respondent's appeal of the Immigration Judge's decision which denied his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). On December 17, 2015, the respondent filed a motion to reopen his removal proceedings based on new evidence. The respondent's motion to reopen will be denied.

A motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material" and "must be accompanied by the appropriate application for relief and all supporting documentation." 8 C.F.R. § 1003.2(c)(1). A motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing" *Id.* Further, the movant must establish prima facie eligibility for the relief sought; and satisfy the "heavy burden" of establishing that if the proceedings were reopened, with all the attendant delays, the new evidence would likely change the result in the case. See *INS v. Doherty*, 502 U.S. 314, 319 (1992); *INS v. Abudu*, 485 U.S. 94, 104-05 (1988); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

With his motion to reopen, the respondent submitted his own affidavit and a mental health assessment, dated (b) (6), 2015, in which a counselor diagnosed him with "Persistent Depressive Disorder (Dysthymia) with anxious distress, in partial remission, moderate." The respondent asserts in his motion that due to his mental state at the time of his hearing, he testified incorrectly that he departed the United States for Mexico in October 1999 and returned to the United States in September 2000. He asserts that he now remembers that he returned to Mexico in (b) (6) 2000 for the birth of his daughter and returned to the United States sometime in (b) (6) 2000. He claims that but for his incorrect testimony, which the Immigration Judge found precluded him from establishing the requisite 10-year period of continuous physical presence in the United States preceding the service of the Notice to Appear ("NTA") on December 31, 2009, he would have been eligible for cancellation of removal under section 240A(b)(1) of the Act. See 8 U.S.C. §§ 240A(b)(1)(A), (d)(1)-(2).


After consideration of the respondent's motion and the totality of the record evidence, we do not find that the respondent has demonstrated that reopening of his proceedings is warranted. See *Matter of Coelho*, *supra*. We note at the outset that the counselor's assessment and diagnosis made no finding that the respondent was not mentally competent at the time of his hearing. The

counselor did not make any assessment regarding the respondent's mental health status in the context of its impact on the respondent's ability to testify at his immigration court hearings. Our review of the record does not identify indicia of mental incompetence during his hearings. See *Matter of M-A-M-*, 25 I&N Dec. 474, 477 (BIA 2011) (stating that "[a]bsent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency). The record reflects that the respondent, who was represented before the Immigration Judge, participated as a witness and testified responsively throughout the proceedings. The transcript shows that the respondent's testimony regarding his departure from the United States in October 1999 and return to the United States in September 2000, was specific, detailed and verified by the respondent multiple times throughout his testimony (see Tr. at 28-30, 38-39, 41; see also Tr. at 61-62; Respondent's Br. at 3-4).

In his December 12, 2015, motion to reopen, the respondent asserts that his ex-wife can confirm that he was in the United States after October 1999 until early 2000, and that she was in the process of requesting documents to prove that he was sending money from the United States to her in Mexico during the time period at issue. He indicates that his ex-wife was willing to provide an affidavit upon her return from Mexico for the holidays, as well as testify in court. We note that, to date, the respondent has not provided the Board with documents indicating that he was present in the United States for a continuous period preceding the service of the December 31, 2009, NTA. He also has not provided the Board with an affidavit from his ex-wife.

Based on the foregoing, the motion will be denied. The following order will be entered.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

OCT 26 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Michael Z. Goldman, Esquire

APPLICATION: Reopening

This case was last before us on March 9, 2015, when we affirmed the Immigration Judge's February 21, 2013, decision denying the respondent's applications for (b) (6), (b) (6). The respondent, a native and citizen of Mauritania, filed a timely motion to reopen on June 8, 2015. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security has filed no opposition or other response to this motion, and the motion is deemed unopposed. See 8 C.F.R. § 1003.2(g)(3). The motion will be granted.

The respondent alleges ineffective assistance by his former counsel, where the Immigration Judge's decision and the record indicate that the former counsel advised the respondent against submitting evidence which directly impacted the outcome of his case (b) (6). (BIA Mar. 9, 2015) at 1-2; I.J. at 8-11; Tr. at 44). The respondent's claim for (b) (6) is predicated on (b) (6) in Mauritania (BIA at 2; I.J. at 2, 8). The evidence he seeks to submit upon reopening is a document from (b) (6), an organization which purportedly (b) (6) in Mauritania. He asserts that his former counsel repeatedly advised him not to present this information, despite the respondent's inclination to present it and the Immigration Judge's queries about the lack of this information on the record (Resp. Mot. at 5-6). The respondent also contends that he offered two pieces of evidence below in support of his (b) (6) in Mauritania—a certificate from the Mauritanian organization (b) (6) which corroborated his testimony, and a statement and identification card from (b) (6). (Resp. Mot. at 7; BIA at 2; I.J. at 10). He notes that we acknowledged but did not rely on this evidence in adjudicating his claim because his former counsel offered it in unauthenticated form and in an untimely fashion, on the day of the hearing (Resp. Mot. at 7; BIA at 2; I.J. at 10).

In *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), we laid out the requirements that a respondent must meet in order to support a claim of ineffective assistance of counsel. First, the motion should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. Second, before the allegation is presented to the Board, the former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure to

respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Matter of Lozada, supra*.

With his motion, the respondent has submitted a sworn affidavit setting forth the parameters of the agreement with his former counsel; a letter informing the former counsel of the allegations against him; and evidence of a bar complaint filed with the New York Disciplinary Committee, Supreme Court, Appellate Division, First Judicial Department (Resp. Mot., Tabs B-D). On the basis of these documents, we conclude that the respondent has complied with the *Lozada* requirements. *Matter of Lozada, supra*. To prevail on his claim of ineffective assistance of counsel, however, the respondent must show not only ineffective representation, but also prejudice resulting from that representation. *Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010).

We conclude that the respondent has satisfactorily demonstrated prejudice resulting from his former counsel's ineffective assistance. Our prior decision rested on a lack of corroboration of the respondent's claim, and we explicitly noted that the decision was not predicated on the Immigration Judge's adverse credibility finding (BIA at 1-2). As such, we agree with the respondent that he suffered prejudice in being advised against presenting evidence which would have directly influenced the determination regarding his eligibility for relief (Resp. Mot. at 6-7; BIA at 2; I.J. at 10-11). See, e.g., (b) (6) (6th Cir. 2006) (stating that we might have adjudicated an alien's claimed (b) (6) in Mauritania differently, had we considered evidence excluded by a lack of competence and diligence on the part of the alien's former counsel).

Accordingly, the respondent's motion will be granted, and the removal proceedings will be remanded to the Immigration Judge for further consideration of the respondent's applications for (b) (6), to include, if desired, the submission of additional evidence by the parties. The following orders shall be issued.

ORDER: The respondent's motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

In re: (b) (6)

MAR 25 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Andre Boghosian, Esquire

APPLICATION: Reopening

The respondent's motion to reopen is untimely. Section 240(c)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The Board entered the final administrative order in the respondent's proceedings on September 8, 2010, when it dismissed the respondent's appeal of the Immigration Judge's denial of his applications for (b) (6).¹ The Board received the current motion to reopen on February 1, 2016. The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be denied.

The respondent asserts that his motion to reopen falls within the exception to the time and number limitations for motions to reopen to apply or reapply for (b) (6) in the country of nationality." (b) (6) (9th 2008) (holding that the Board properly concluded that an alien, who was subject to a final order of removal and sought to file an application for (b) (6) based on (b) (6), could apply for (b) (6) only in connection with a motion to reopen, subject to the time and number limitations of 8 U.S.C. § 1229a(c)(7)). In his motion, the respondent contends that he (b) (6) in Armenia based on his (b) (6) in the United States (*Motion* at Tab H, Respondent's Affidavit).

The respondent's untimely motion to reopen does not qualify for the (b) (6) to the 90-day time limit. First, the respondent's (b) (6) in the United States (b) (6) in Armenia such that his motion falls within this exception to the time limits for motions to reopen. (b) (6) (9th Cir. 2007). Second, the respondent's affidavit is speculative as to what will happen to him in Armenia, and does not demonstrate that his possible treatment in Armenia, (b) (6) (see *Motion*, Tab H). Third, the letters from the respondent's father, aunt, and uncle are speculative as to what will happen to the respondent upon his return to Armenia (*Motion*,

¹ The United States Court of Appeals for the Ninth Circuit denied the respondent's petition for review on (b) (6), 2013.

(b) (6)

Tabs I-K). Finally, the (b) (6) and are of unknown origin (*Motion*, Tab L). See (b) (6) (BIA 2007) (stating that genuine, authentic, and objectively reasonable evidence is required for reopening); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012).

Furthermore, the respondent's evidence does not indicate that (b) (6) since his previous hearing in 2009. Rather, the evidence indicates that (b) (6) (*Compare Motion*, Tabs N, P, Q, *with* Exh. 8). Therefore, the respondent has not submitted persuasive new or previously unavailable evidence that is sufficient to meet his "heavy burden" of showing that it is likely that the result would change if the proceedings were reopened. See generally *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Finally, the respondent has not shown that an "exceptional situation" exists that would warrant the Board's exercise of its discretion to reopen these proceedings sua sponte. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (stating that "as a general matter, we invoke our sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations"). Accordingly, the motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - San Diego, CA

Date: FEB 23 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mayra A. Gamez, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. § 1182(a)(6)(E)(i)] -
Alien smuggler

APPLICATION: Termination; continuance

The respondent appeals from the Immigration Judge's September 18, 2014, decision finding him removable as charged and ordering him removed from the United States to Mexico. The appeal will be dismissed.

Under 8 C.F.R. § 1003.1(d)(3), the Board defers to factual findings unless they are clearly erroneous, but it conducts de novo review of all remaining issues including questions of law, judgment and discretion.

In an order dated November 8, 2013, the Immigration Judge denied the respondent's motion to suppress (I.J. at 3-4; Exh. 18). In a decision dated September 18, 2014, the Immigration Judge denied the respondent's motion to terminate proceedings, sustained the Department of Homeland Security's (DHS) charge of removability, and ordered the respondent removed to Mexico (I.J. at 5-9).

On appeal, the respondent maintains that the Record of Deportable/Inadmissible Alien (Form I-213) and other documents submitted by the DHS should have been suppressed (Resp. Br. at 2-5; Exh. 16). The Form I-213 indicates that the respondent was questioned on April 30, 2011, at the San Ysidro, California port of entry and admitted to attempting to smuggle his girlfriend (b) (6) into the United States by using a California driver's license that he stole from his cousin (I.J. at 6-7; Exh. 16 at 1-3). The Notice to Appear (Form I-862) (NTA) charges the respondent with inadmissibility under section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), as an alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law (Exh. 1).

Whenever an alien in removal proceedings questions the legality of evidence, he must provide proof establishing a prima facie case that the government's evidence was unlawfully obtained before the burden will shift to the government to justify the manner in which it obtained

the evidence. See *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980).

We are not persuaded by the respondent's arguments on appeal that alleged regulatory violations by the government require that his motion to suppress be granted (Resp. Br. at 2-5). He argues that immigration officers failed to advise him as required by 8 C.F.R. § 287.3(c) of his right to counsel or that any statement he made may be used against him in a subsequent proceeding (Resp. Br. at 2-5). This contention is foreclosed by *Samayoa-Martinez v. Holder*, 558 F.3d 897, 901-02 (9th Cir. 2009), which held that the obligation to notify the alien of the rights provided in 8 C.F.R. § 287.3(c) does not attach until the alien has been arrested and "placed in formal proceedings." See 8 C.F.R. § 287.3(c). Removal proceedings do not commence until an NTA is filed in the immigration court. 8 C.F.R. § 1239.1(a); see also *Samayoa-Martinez v. Holder*, *supra*, at 901. Similarly, in *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011), the Board agreed with the reasoning in *Samayoa-Martinez* and held that under the plain language of 8 C.F.R. § 287.3(c), "an alien who is arrested without a warrant is not entitled to advisals until he or she is 'placed in formal proceedings.'" *Id.* 583. While the respondent argues that our decision in *Matter of E-R-M-F- & A-S-M-*, *supra*, is incorrect, it is binding precedent in this case (Resp. Br. at 2-3).

Here, the respondent was questioned on (b) (6), 2011, before he was placed in formal removal proceedings by the filing on the NTA on May 18, 2011 (Exhs. 1, 16). Thus, his statements were made before the initiation of formal removal proceedings and the immigration officers were not required to give any advisals under 8 C.F.R. § 287.3(c). To the extent that the respondent argues that the Immigration Judge erred in concluding that he was not under arrest at the time of his detention, the Immigration Judge made no such finding (Resp. Br. at 4-5). For these reasons, the Immigration Judge correctly denied the respondent's motion to suppress. The Immigration Judge also properly concluded that the DHS met its burden of showing by clear and convincing evidence that the respondent knowingly encouraged, induced, assisted, abetted, or aided (b) (6) to enter or to try to enter the United States in violation of law, because the evidence submitted by the DHS shows that the respondent admitted to helping (b) (6) attempt to enter the United States illegally (I.J. at 5-7; Exh. 16).

Next, the respondent argues that the Immigration Judge erred by denying his request to continue his removal proceedings to pursue Deferred Action for Childhood Arrivals (DACA) (Resp. Br. at 5-8; I.J. at 8; Tr. at 18-19, 23). On February 14, 2012, the respondent's first hearing, the Immigration Judge continued the case for attorney preparation (Tr. at 2-3). The respondent's hearing on June 19, 2013, was continued because the DHS did not have his file and requested time to submit additional evidence (Tr. at 7-9). At his next hearing on March 5, 2014, the respondent, through counsel, indicated that he might seek prosecutorial discretion or DACA but had not done so yet (Tr. at 10-11).¹ The Immigration Judge reset the case for a merits hearing on September 18, 2014, noting that he was setting the case out "far enough" to allow the respondent to file any requests to DHS (Tr. at 11-12). On his September 18, 2014, merits

¹ The respondent's request for prosecutorial discretion was denied (I.J. at 8; Tr. at 19).

hearing, the respondent, through counsel, submitted proof of filing a DACA application on September 11, 2014, just days before his merits hearing (I.J. at 8; Tr. at 16, 18; Exh. 21). During his September 18, 2014, hearing, the respondent requested another continuance to pursue relief through DACA (Tr. at 23).

Upon de novo review, we find that the Immigration Judge did not abuse his discretion in denying the respondent's request for a continuance. The respondent has not established good cause for a continuance to pursue DACA. See 8 C.F.R. § 1003.29; see also *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987) (the decision to grant or deny a continuance is within the sound discretion of the Immigration Judge, if good cause is shown, and will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing). The respondent's desire to seek deferred action does not warrant a continuance of removal proceedings because the decision to grant an alien deferred action lies within the exclusive jurisdiction of the DHS (I.J. at 8). See *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982) ("[S]ince the respondent can request deferred action status at any stage in the proceedings, the immigration judge did not err in refusing to adjourn the hearing to allow him to pursue that relief."). An order of removal does not preclude the government from adjudicating an application for deferred action. Additionally, during the pendency of this appeal, for the past year and a half, the respondent has not updated the record with proof that his DACA application was approved. Thus, we find that the respondent has not demonstrated any resultant prejudice from the Immigration Judge's denial of his continuance request. See *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

Files: (b) (6) – New York, NY

Date:

MAY 25 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Alexander J. Segal, Esquire

APPLICATION: Cancellation of removal; reopening

The respondents, natives of the former Soviet Union and citizens of Ukraine, appeal the decision of the Immigration Judge, dated August 27, 2015, which denied their applications for cancellation of removal. See section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). On appeal, the respondents also move to remand, submitting new evidence. The appeal will be dismissed and the motion will be denied.

We review the findings of fact, including the determination of credibility made by the Immigration Judge, under a “clearly erroneous” standard. See 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. See 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the Immigration Judge’s determination that the respondents did not demonstrate exceptional and extremely unusual hardship (“EEUH”) to their two United States citizen children (I.J. at 6-7). See section 240A(b)(1)(D) of the Act. The Immigration Judge properly considered the aggregate effect of the relevant hardship factors, including the age and health, the existence of family in the Ukraine and the United States, and the financial and emotional impact of the family’s removal (I.J. at 2-3, 5-7). See *Matter of Recinas*, 23 I&N Dec. 467, 472 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319, 323-324 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001).

The respondents testified that they would bring their children with them to the Ukraine if they are removed (I.J. at 2). They argued that they will not be able to find work in the Ukraine, and the children will thus suffer economic hardship and reduced educational opportunities (I.J. at 2; Respondents’ Br. at 10-12). The respondents also speculated that, without an income, they would be unable to afford adequate medical and dental care (Respondents’ Br. at 12; I.J. at 2). Finally, the respondents expressed concern that the current political situation in the Ukraine will deteriorate further and they will be at risk of “mistreatment” because they speak a little Russian (Respondents’ Br. at 12-13; I.J. at 2, 6).

The Immigration Judge correctly found that none of these factors establish hardship that is “substantially different from, or beyond, that which would normally be expected from the

deportation of an alien with close family members here.” *Matter of Monreal, supra*, at 65. She found that the children do not have any health issues for which they need exceptional medical care unavailable in the Ukraine (I.J. at 6). See *Matter of Monreal, supra*, at 63 (a strong applicant for cancellation of removal might have a qualifying child with “very serious” health issues). The respondents assert that one child, (b) (6), does very well in school, while the other child, (b) (6), “struggles” and has taken summer classes (Respondents’ Br. at 10-11); however, the Immigration Judge correctly found no indication that either child has exceptional educational needs (I.J. at 5).

The respondents submitted a psychological report on the children which expresses concern that they would be at risk for the loss of their “educations, depression and anxiety” and that the children would “be unable to adjust in a healthy way” (Respondents’ Br. at 9-10; Exh. 3 at 11-12). We agree with the Immigration Judge that these concerns are not outside the realm of what others who relocate to an unfamiliar country would face (I.J. at 6). The report did not define any specific mental illness or emotional issues; instead, as the respondents admit, the psychologist describes the children as “strong” (Respondents’ Br. at 9). Additionally, the report does not take into account that the children have visited the Ukraine during the summers; therefore, it is not a totally unfamiliar culture (I.J. at 2).

Otherwise, the respondents believe that their children will suffer from diminished educational opportunities and poor economic conditions. These factors generally are insufficient grounds for a grant of cancellation (I.J. at 5-6). See *Matter of Andazola, supra*, at 323 n. 1. The respondents do not rebut the Immigration Judge’s finding that political strife in Ukraine is currently limited to a geographic region which is not near the respondents’ hometown (I.J. at 6). Their speculation about the possibility of more generalized civil strife in Ukraine is unpersuasive (I.J. at 6). Thus, we affirm the Immigration Judge’s denial of cancellation of removal for the reasons he described.

With their appeal, the respondents submit a motion to remand and new evidence. When new evidence is presented for the first time on appeal, it may be deemed a motion to remand for consideration of the new evidence. A motion to remand is subject to the same substantive requirements as a motion to reopen. See 8 C.F.R. § 1003.2(c)(1); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). The Board ordinarily will not consider a discretionary grant of a motion to remand unless the moving party meets a “heavy burden” and presents evidence of such a nature that the Board is satisfied that if proceedings before the Immigration Judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case. *Matter of Coelho, supra*, at 473, citing *INS. v. Doherty*, 502 U.S. 314 (1992).

The respondents claim that their prior attorney, Ms. Olga Bychok, provided them ineffective assistance before the Immigration Judge, as she did not pursue the lead respondent’s application for adjustment of status based on his approved Immigrant Petition for Alien Worker (Form I-140).¹ The lead respondent’s application was denied by the United States Citizenship

¹ The co-respondent filed a derivative application for adjustment based on the lead respondent’s application.

and Immigration Services ("USCIS") on March 8, 2010, because he did not establish that he was eligible to be "grandfathered" under section 245(i) of the Act, 8 U.S.C. § 1255(i). This provision allows an alien who was not inspected or admitted to adjust his status if he was the beneficiary of an approved Form I-140 and that form or application for labor certification (Form ETA 750) was filed on or before April 30, 2001. Section 245(i)(1)(B)(i) of the Act. The USCIS determined that the lead respondent did not demonstrate that his Form ETA 750 was filed on or before that date.

The respondents provide an affidavit from their previous attorney, Ms. Olga Bychok, stating that she advised the respondents not to re-apply for adjustment before the Immigration Judge because she concluded that they were ineligible. She acknowledges that she was unaware of the existence of an April 30, 2001, USCIS Policy Memo, "Field Guidance Regarding Eligibility for Section 245(i) under the Legal Immigration Family Equity Act". This Policy Memo provides that the postmark on the labor certification application (Form ETA 750) establishes the filing date, but further states that if the postmark is "unavailable," receipt of the application at the appropriate office by May 3, 2001, will be sufficient to demonstrate timely filing for purposes of section 245(i) of the Act. The date of signature on the lead respondent's lead respondent's Form ETA 750 is April 30, 2001, and the receipt date is May 3, 2001.

Pursuant to *Matter of Lozada, supra*, an alien claiming ineffective assistance of counsel must submit: (1) an affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in this regard; (2) proof that the alien notified former counsel of the allegations of ineffective assistance and allowed counsel an opportunity to respond; and (3) if a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien filed a complaint with any disciplinary authority regarding counsel's conduct and, if a complaint was not filed, an explanation for not doing so.

The respondents acknowledge that they chose not to file a complaint against Ms. Bychok with the appropriate state bar association (Respondents' Br. at 22). Instead, the respondents' current attorney spoke to Ms. Bychok by phone, and she submitted the affidavit that the respondents attach to their motion.

We conclude that the respondents are not in compliance with the *Lozada* requirements. The Court of Appeals for the Second Circuit has upheld the application of the *Lozada* requirements. See *Jian Yun Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 46-47 (2d Cir. 2005) (holding that failure to comply with *Lozada* is a valid basis for denial of reopening); cf. *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007) (rejecting "slavish adherence" to the *Matter of Lozada* requirements, and finding substantial compliance where the alien demonstrated that his attorney had been disbarred).

In *Matter of Lozada, supra*, we explained that:

The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. . . . Then, too, the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses, thereby

discouraging baseless allegations. The requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in immigration proceedings.

Id. at 639-40. The allowance for “substantial compliance” with the *Lozada* requirements provides the alien with leeway in circumstances where full compliance is difficult or impossible, not when he has made an agreement with his prior attorney to avoid it.

Thus, we conclude that the respondents have not substantially complied with the requirements of *Matter of Lozada*, and we decline to remand on the basis of their ineffective assistance claim. Accordingly, the following order will be entered.

ORDER: The respondents’ appeal is dismissed, and their motion to remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Dallas, TX

Date:

NOV 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Fangzhong Tian, Esquire

APPLICATION: Reopening

This case was last before us on August 15, 2011, when we entered a final administrative order dismissing the respondent's appeal. On August 3, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent, a native and citizen of China, applied for (b) (6). The Immigration Judge found that he was not credible. The respondent now seeks reopening to apply for a (b) (6) based on his (b) (6) in the United States, and to apply for (b) (6) based on (b) (6) in China.

He offers his (b) (6) application, affidavit, passport, employment authorization card, driver's license, and (b) (6), letters and identity cards from relatives and a friend in China, documents that purport to be a (b) (6), a 2007 bail receipt, and (b) (6) photographs, internet blog entries, excerpts from the 2012 and 2013 Country Reports on China, media reports, and a letter from the U.S. Attorney for the District of New Mexico.

The respondent states that his ex-wife contacted an individual to help him get a driver's license and an employment authorization card, that he paid him \$1,650 and got a New Mexico driver's license, and that he did not know that it was illegal for the individual to provide him with a faked address to get his license. *See* Exhibit B, ¶ 12. He relates that the individual helped him get his employment authorization card, but that individual signed the card, not him. *Id.* He reports that USICE agents came to his home, told him that his driver's license was invalid, and arrested him. *Id.*, ¶ 13. He states that he went through several court hearings, was transferred to jails in Texas, Oklahoma, and New Mexico, and realized that he must cooperate with the U.S. Government by acting as a government witness. *Id.* He recounts that he testified to getting his driver's license, was released, and later voluntarily returned to New Mexico to testify as the government's witness, after which he got a notice of case closure. *Id.*

He states that he (b) (6) in 2012, became a (b) (6) in 2014 and another in 2015. *Id.*, ¶¶ 14, 16. The respondent claims that he (b) (6) and with his real name and real head image set up a website and (b) (6). *Id.*, ¶ 14. He states that on (b) (6). *Id.*, ¶ 15. He reports that on (b) (6). *Id.*, ¶ 16. He declares that if he returned to China now, he will (b) (6) and would (b) (6). *Id.*, ¶ 17.

The instant case arises in the jurisdiction of the United States Court of Appeals for the Fifth Circuit, and we decline to apply the decisions that the respondent cites from outside of the Fifth Circuit. We will deny the respondent's motion because he has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he has not established his prima facie eligibility for relief. *See Matter of S-Y-G-*, *supra* (a motion to reopen based on (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief); *generally Zhang v. Gonzales*, 432 F.3d 339, 344-45 (5th Cir. 2005); *Panjwani v. Gonzales*, 401 F.3d 626 (5th Cir. 2005).

The evidence reflects that some (b) (6) in China have (b) (6) there. *See, e.g.,* Exhibit P, 2012 and 2013 Country Reports excerpts at 77-81; Exhibit O. We have found that U.S. State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part, Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). However, the evidence is not adequate to demonstrate that (b) (6) upon their return to China based (b) (6) in the United States, and we cannot simply extrapolate, based on what happened to these individuals in China, and in the absence of specifics about the facts of these cases, that (b) (6) in the United States would be (b) (6). *See generally* (b) (6) (the Board will not "simply extrapolate" based on the case of another individual in China that an alien returning from the United States would be (b) (6)).

To the extent that the respondent is claiming a (b) (6) in China with regard to the (b) (6) the United States, he has not presented sufficient evidence of such a change since the time of his hearing in 2009. See generally *Panjwani v. Gonzales*, *supra*. The respondent's evidence reflects that (b) (6) there has been a continuing (b) (6) including the time of the respondent's proceedings in 2009. See, e.g., Exhibit P; Exhibit O. We conclude that the evidence is not sufficient to show (b) (6) in China with respect (b) (6) in the United States who return to China.

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. See *Zhang v. Gonzales*, *supra*; *Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 549 (5th Cir. 2006). We find that reports that (b) (6) there does not prima facie demonstrate that the respondent in this case has (b) (6) upon his return to China (b) (6) in the United States because it does not indicate (b) (6) in this country. See, e.g., Exhibits O and P.

We give limited weight to the statement of the President (b) (6) in the United States, who alternately refers to the respondent as (b) (6), and who states that on (b) (6), which date has not yet occurred. See Exhibit J. The material inaccuracies in his statement undermine its evidentiary worth.

We also give limited weight to the letters from the respondent's parents and friend in China. See Exhibits D-1 to D-3. They claim that his parents (b) (6), and his mother relates that she and her husband were (b) (6) for (b) (6) because they had nothing to say. *Id.* These claims are not supported by evidence such as (b) (6). Moreover, these statements are from interested witnesses who are not subject to cross-examination, and they appear to have been created for the purpose of litigation. These documents are of essentially unknown reliability and, given the respondent's previous lack of candor, we do not find them to have been shown to be of sufficient evidentiary worth to support reopening these proceedings. See *Matter of H-L-H- & Z-Y-Z*, *supra*. We conclude that the respondent has not satisfied his burden of proof to establish his prima facie eligibility for (b) (6) because the evidence is not sufficient to demonstrate (b) (6) upon his return to China (b) (6). See (b) (6).

The respondent submits (b) (6) but no other evidence of (b) (6) in the United States. See Exhibit R. He has not offered evidence for his claim that if he returns to China, he will (b) (6). See Exhibit B, ¶ 17. He has not presented evidence of the (b) (6) in China, or evidence of (b) (6) there. We conclude that he has not demonstrated (b) (6) since

(b) (6)

his 2009 hearing to warrant an exception to the time limit for his motion to reopen, and has not met his burden to establish that he is prima facie eligible for (b) (6).

The respondent has not made a prima facie showing that (b) (6)

(b) (6) upon his return because his evidence does not indicate a (b) (6). See (b) (6).

We find no merit in the respondent's contention that reopening is warranted because he is entitled to a (b) (6) in a completed (b) (6). See Motion at 10-11. A (b) (6)

(b) (6). See (b) (6). To establish prima facie eligibility for a (b) (6), an alien must (b) (6) for which the alien has been, is being, or (b) (6), which ordinarily requires an (b) (6). See (b) (6) (BIA 2012). The respondent claims that he paid an individual and got a New Mexico driver license, and that he did not know that it was illegal for the individual to provide him with a faked address to get his driver's license. See Exhibit B, ¶ 12. His evidence reflects that he testified as a (b) (6) of an individual on charges of fraud in connection to obtaining identity documents, transporting illegal aliens, engaging in monetary transactions in property derived from specified unlawful activity, and witness tampering. See Exhibit Q. The respondent has not demonstrated that he (b) (6). See (b) (6). As he has not shown that he is prima facie eligible for (b) (6), we find no basis to reopen his proceedings on that basis.

The respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. His evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6) (5th Cir. 2007). The respondent has not met his burden to prove that his removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the respondent's motion exceeds the time limitation for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Dallas, TX

Date:

In re: (b) (6)

OCT 28 2015

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Fangzhong Tian, Esquire

APPLICATION: Reopening

This case was last before the Board on June 21, 2011, when the Board dismissed the respondent's appeal from the Immigration Judge's July 29, 2009, decision denying the respondent's application for (b) (6).

On August 4, 2015, the respondent, who purports (b) (6) in the United States, filed the present motion to reopen. The motion will be denied.

To the extent the respondent's motion could be construed as a motion to reconsider the Board's June 21, 2011, decision, the respondent's motion is untimely. See 8 C.F.R. § 1003.2(b). Considered as a request for reopening, the motion is untimely filed and has not been shown to qualify for any exception to the filing requirements imposed by law on motions to reopen removal proceedings. See section 240(c)(7)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(2). First, the respondent's (b) (6)

in this country since the Immigration Judge's July 2009 decision demonstrates a (b) (6) in the country of nationality." (b) (6) Evidence of (b) (6)

China such that the respondent's motion may be found to fall within the exception to the time limits applicable to motions to reopen. See (b) (6) (BIA 2007).

Second, the evidence proffered along with the pending motion does not sufficiently reflect (b) (6) since this case was last before the Immigration Judge. Indeed, despite its scant nature, the proffered country information reflects that the Chinese (b) (6)

in China, including (b) (6). Further, the submitted evidence does not reflect that any (b) (6) after the Immigration Judge's July 2009 decision formed the basis of (b) (6), or that China's (b) (6)

has significantly changed. Rather, the respondent's evidence reflects that (b) (6)

Under the circumstances, that (b) (6)

of the respondent's (b) (6) does not bolster her claim that conditions in China (b) (6).

Moreover, the alleged affidavit from the respondent's father in China contains no independent evidence supporting his assertion that the (b) (6) and it provides no details regarding the circumstances surrounding his alleged receipt of such information (Respondent's Brief at attached Affidavit at Tab D-2). Under the circumstances, we afford little weight to the witness affidavit, which was created by an interested party who was not subjected to cross examination and whose statement was not sworn to before an officer authorized to administer oaths. See, e.g., *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F. 3d 130 (2d Cir. 2012) (affording little weight to unauthenticated copies of documents that failed to identify the authors, who were not subject to cross examination, and were obtained for the purposes of the hearing); *Matter of S-Y-G-*, 24 I&N Dec 247, 253 (BIA 2007) (requiring genuine, authentic, and objectively reasonable evidence for reopening). We are not inclined to overlook the noted deficiencies particularly where, as here, the respondent does not meaningfully address or explain the circumstances surrounding her receipt of the alleged letter from China. In any event, the proffered evidence, including the alleged affidavit from the respondent's father, does not describe or indicate that the respondent would (b) (6) on (b) (6) in this country.

The respondent's affidavit also asserts her (b) (6). However, the respondent does not contend that she (b) (6) nor has she proffered any evidence in support of such a claim. Additionally, the respondent has proffered no evidence reflecting that she is the beneficiary of an approved, much less pending, (b) (6) petition.

On this record, the respondent has not provided an adequate basis to excuse the untimeliness of the present motion. Nor has she demonstrated an exceptional situation that would warrant reopening of these proceedings under the Board's discretionary sua sponte authority. Accordingly, we will enter the following order.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) - Boston, MA

Date: SEP 25 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

APPLICATIONS: Reopening; remand

This case was last before us on October 31, 2012, when we denied the respondent's motion to reopen his removal proceedings. On (b) (6), 2013, the United States Court of Appeals for the First Circuit, pursuant to a stipulation of the parties, vacated our order and remanded this case to us for clarification of several aspects of our decision.¹ Specifically, the stipulation and order directs the Board to clarify which foreign documents we found to be sufficiently authenticated and which were not, to clarify whether we found that the respondent failed to establish prima facie eligibility for relief, or if we denied the motion to reopen because he failed to show (b) (6), and to address the documents from the respondent's home city and home province.

The respondent's motion will again be denied. The motion was submitted more than 3 months after we entered an administratively final order dismissing the respondent's appeal, and as such, it was not timely filed. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See (b) (6) (2d Cir. 2008). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. He applied for (b) (6) in China, and (b) (6) in the United States. He seeks to have his removal proceedings reopened based on a (b) (6)

¹ The Board was not informed of the court's order until October 2014.

(b) (6)

(b) (6) in China and an assertion that the 2007 Country Profile on China is deficient and unreliable.

With his motion, the respondent offered evidence which he previously submitted, including his marriage certificate, his children's birth certificates, and a portion of the 2007 Country Profile on China.

As set forth in our prior decision, the respondent also offered his (b) (6) application, his statement, a Freedom of Information Act (FOIA) request and response in an unrelated case from an attorney who does not represent him, 2003 shipping codes, a 2006 service contract, correspondence from his counsel, other FOIA responses and a FOIA appeal, portions of 2002 and 2004 State Department reports, the Nationality Law of the People's Republic of China, the 1999 Chang Le City Family Planning Q&A Handbook, the Langqi Town Family Planning Q&A Handbook, the Ying Qian Town Family Planning Q&A Handbook, the 2003 Administrative Decision of the Fujian Province Family Planning Administration, the 2003 Consular Information Sheet, a 2005 Lianjiang County Guantou Township Committee Official Directive, inquiries and responses from the Beautiful Family website, the Fuzhou Call Center for the Convenience of the People, the Mei Hao Jia Yuan website, and the Fujian Province Population and Family Planning Committee, documents that purport to be from the Changle City Population and Family Planning Leadership Group, the Chinese Communist Party Chang Le City Shou Zhan Township Committee, the Shou Zhan Township Population and Family Planning Leadership Group, the Jin Feng Township Population and Family Planning Leadership Group, the Family Planning Leading Group of Tantou Town, the Lian Jiang County Population and Family Planning Leadership Group, and the Fuzhou City Mawei District Tingjiang Town People's Government, regulations from Cangshan District, Xiuyu District, Xiang An, Luanfeng Township, Nanyang Town, Sha County, Zhangpu County, Guantou Township, Ying Qian Town, Guangze County, and Long Tian Township, Responses to Information Requests from the Immigration and Refugee Board of Canada, Responses from the Refugee Review Tribunal of Australia, a 2007 report of investigation by the U.S. Citizenship and Immigration Services, portions of the 1994 and 1995 Country Reports on China, portions of the 1998, 2004, and 2005 Country Profiles on China, portions of the 2009 and 2010 Annual Reports of the Congressional-Executive Commission on China (CECC), the opinion, vita, and affidavit of Dr. (b) (6) of the Julius-Maximilians University in Germany, an unpublished decision of the Second Circuit, evidence submitted in unrelated (b) (6) cases, research articles, and media reports.

The respondent declared that according to the (b) (6) of P. R. China and particularly in Fujian Province, (b) (6). See Exhibit A, Respondent's statement.² He claims that since he and his wife have had (b) (6), if he were sent back to China now, he will

² The respondent submits two groups of exhibits, both containing exhibits labeled A-D. To avoid confusion, we will refer to the type of document as well as the exhibit label for these exhibits.

(b) (6)

(b) (6) and will be (b) (6). *Id.*

The respondent contends that there is the (b) (6) in China's (b) (6), and that while (b) (6), there have been continuing reports of (b) (6) in some areas, and that the (b) (6) China renders its (b) (6). See Motion at 3, 24-29, 41, 50-52, 55. He asserts that the 2007 Profile does not reflect current conditions and is an unreliable source because it was not written by the State Department, it is out of date, and it relies substantially on information received directly from the Chinese government. *Id.* at 2.

The stipulation and order asked us to clarify which official foreign documents we found to be sufficiently authenticated and which were not. Although the respondent's documents from China have not been authenticated pursuant to 8 C.F.R. §1287.6, he has offered evidence that his counsel and another attorney sought information about some of them. Moreover, several of his foreign documents may be characterized as public documents that may be accepted without compliance with the authentication procedure in 8 C.F.R. §1287.6. For purposes of this motion, we will consider all of the respondent's foreign documents from China without regard to whether they have been sufficiently authenticated, and accord them appropriate weight. See *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), *rev'd in part*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *Matter of S-Y-G-*, *supra*.

The stipulation and order also asked us to clarify whether we found that the respondent failed to establish prima facie eligibility for relief, or if we denied the motion to reopen because he failed to show (b) (6). We will again deny the respondent's motion for both reasons, that is, he did not demonstrate (b) (6) in China to warrant an exception to the time limit for motions to reopen, and he did not establish prima facie eligibility for relief. See (b) (6) (1st Cir. 2014) (substantial evidence failed to demonstrate (b) (6)), as required to support Chinese alien's untimely motion to reopen removal proceedings); *Matter of S-Y-G-*, *supra* (a motion to reopen based on changed country conditions must also demonstrate that the applicant is prima facie eligible for the requested relief).

The evidence regarding (b) (6) in China (b) (6) is not sufficient to demonstrate a (b) (6) since the time of the respondent's removal hearing in 2009. See (b) (6) (1st Cir. Sept. 11, 2015) (to show (b) (6), a respondent must make a "convincing demonstration" of (b) (6), not just a continuation of conditions). The evidence reflects that (b) (6) continue to be used to (b) (6) that has been in place since before the respondent's 2009 hearing. See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-153; Exhibit E, § IV; Exhibit SSS, § VII; Exhibit

(b) (6)

TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII. We have found that State Department reports on country conditions are highly probative evidence and are usually the best source of information on conditions in foreign nations. *Matter of H-L-H- & Z-Y-Z-, supra*; see *Liu Jin Lin v. Holder*, 723 F.3d 300, 304 (1st Cir. 2013); *Chen v. Holder*, 675 F.3d 100, 108 (1st Cir. 2012). Moreover, the evidence indicates that (b) (6) in some areas of China have been a longstanding concern, including at the time of the respondent's 2009 hearing. See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-153.

The evidence demonstrates that incentives and rewards continue to be provided for compliance with the (b) (6). See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23, 119 (citing instances of rewards given to (b) (6)); Exhibit B, 2009 Annual Report of the CECC at 153-156 (citing instances of (b) (6) despite national law (b) (6)); Exhibit U (response to a 2008 inquiry from (b) (6) on the website of the (b) (6) of Fujian Province). It reflects that (b) (6) are provided to (b) (6), and that (b) (6) in the respondent's locality, (b) (6) which includes (b) (6). See, e.g., Exhibit A, 2010 Annual Report of the CECC at 23-24, 116-120; Exhibit B, 2009 Annual Report of the CECC at 151-158; Exhibit E, § IV and Appendix B; Exhibits CC-FF; Exhibit PPP; Exhibit SSS, § VII; Exhibit TTT, § IV(1) and (2); Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit WWW, attachment 4; Exhibit XXX, § VII.

While some of the documents offered by the respondent announce renewed efforts to (b) (6) that have been in place since the 1980s, they do not describe a (b) (6). See, e.g., Exhibits CC-HH, MM-OO, RR-TT, VV-DDD, FFF-HHH, KKK-NNN, PPP. At most, these reports reflect that pressures to (b) (6) vary from locale to locale and fluctuate incrementally from time to time. *Id.* We conclude that the evidence of (b) (6) in China (b) (6) since the time of the respondent's removal hearing in 2009.

The respondent is from (b) (6). The stipulation and order directed us to address the documents from the respondent's home city and home province. These documents are Exhibit E, Appendix B, and Exhibits U-W, CC-FF, PP, and PPP. They reflect that residents in the respondent's locality are subject to the (b) (6) continue to be provided for compliance with the (b) (6), as well as (b) (6). *Id.*; see, e.g., Exhibit E, Appendix B, Chapter 5, Incentives and Rewards. We find that the current

(b) (6)

(b) (6) is a continuation of the same or similar policy since before the respondent's hearing in 2009.

We give limited weight to the respondent's documents that were submitted in (b) (6) cases of persons from other areas of China who are not related to him, and do not involve (b) (6) in the United States. See Exhibits QQQ, RRR. The respondent has not shown that these documents are material to his claim nor demonstrated that the circumstances in those cases are substantially the same as the circumstances in his case.

Motions to reopen are disfavored and the burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. See *Haizem Liu v. Holder*, 727 F.3d 53 (1st Cir. 2013); *Zheng v. Mukasey*, 546 F.3d 70, 71-72 (1st Cir. 2008); *Matter of H-L-H- & Z-Y-Z-*, *supra*. The evidence reflects that China regards a (b) (6), and that there have been reports of some (b) (6) in some areas of China, contrary to the national policy. However, we find that it is not sufficient to prima facie establish (b) (6) upon his return to China under (b) (6) because the evidence does not indicate the likelihood of (b) (6) in the United States. See (b) (6).

We again find that the respondent has not established that the 2007 Country Profile on China is unreliable. The evidence does not support his claim that the 2007 Profile is heavily reliant upon information provided by the Chinese government. See Motion at 2, 10-13, 17; Exhibit E. We find that State Department reports, including Country Profiles, cite multiple sources of information, such as consulate general reports, foreign intelligence reports, foreign press reports, international think tank reports, almanacs, and other collaborating sources, and often provide appendices of supporting documents. See, e.g., Exhibit E, at 1-2, § VI; Exhibit SSS, § VII; Exhibit TTT, § IV; Exhibit UUU, § IV; Exhibit VVV, § IV; Exhibit XXX, § VII.

We are not persuaded by the respondent's contention that the 2007 Profile is unreliable because it is out of date. See Motion at 2, 18-19. He has not shown that the historical information contained in the Profile or the assessment of conditions in 2007 are inaccurate. In addition, he has not shown that the alleged deficiencies in the 2007 Profile he cites would be likely to change the result in his case, nor has he provided evidence that the Department of State has retracted or corrected the conclusions reached in the 2007 Profile.

Dr. (b) (6)'s opinion and affidavit set forth her critique of the 2007 U.S. State Department Profile on China and supporting documents. See Exhibit C, Dr. (b) (6)'s opinion; Exhibit JJ, Dr. (b) (6)'s affidavit. However, Dr. (b) (6)'s opinion is not based on personal knowledge, and it speculates regarding suspect motivations of the State Department and the validity of the sources on which the State Department relies. We do not find it to be persuasive.

The respondent has not demonstrated that he would be (b) (6). See (b) (6) (BIA 2007)(a showing of (b) (6) to

(b) (6)

(b) (6), but a showing of (b) (6) does not amount to (b) (6) where the record contains scant information concerning the applicant's (b) (6); see also (b) (6) (must present evidence of (b) (6)). The respondent has not offered information to establish his current (b) (6) nor adequate evidence to demonstrate that he would (b) (6) in China.

Moreover, the respondent has not made a prima facie showing that it is (b) (6)

. See (b) (6).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. The evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). See (b) (6) (1st Cir. 2009); (b) (6) (BIA 2006); (b) (6). Nor has the respondent shown prima facie eligibility for the relief sought. He has not satisfied his burden to demonstrate that his removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find no basis to remand the record for further proceedings. Accordingly, as the motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen and remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date:

JAN 11 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jaspreet Singh, Esquire

ON BEHALF OF DHS: James F. Polivka
Assistant Chief Counsel

APPLICATION: Reopening

The motion to reopen is untimely, and will be denied. On February 5, 2013, the Board dismissed the respondent's appeal. On October 30, 2015, the respondent filed the current motion to reopen. Sections 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) & (C)(i); 8 C.F.R. § 1003.2(c). The Department of Homeland Security objects to the granting of the motion. The motion is denied as untimely.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of deportation or removal. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6)

(b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999).

Motions to reopen are disfavored and strict limits endorsed in removal proceedings where every delay works to the advantage of an alien illegally residing in the United States who wishes to remain. *Matter of S-Y-G-*, *supra*, 24 I&N Dec. at 252. The movant must establish *prima facie* eligibility for the relief sought, *INS v. Doherty*, 502 U.S. 314, 319 (1992); *INS v. Abudu*, 485 U.S. 94, 104-05 (1988), and has the heavy burden of demonstrating that the "new evidence offered would likely change the result in the case." *Matter of S-Y-G-*, *supra*, 24 I&N Dec. at 251, *quoting Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992).

The respondent seeks reopening to pursue a claim for (b) (6). The respondent argues that his family from India has informed him that (b) (6). His family also advised that the respondent (b) (6) India because he (b) (6). In support of his motion, he has

(b) (6)

submitted the 2014 Country Report on India, as well as a cover sheet for the (b) (6) with a statement (b) (6) and a full page picture of (b) (6).

The motion is denied because the respondent has not submitted a new (b) (6) application. See 8 C.F.R. § 1003.2(c)(1). Further, the additional evidence attached to the motion does not demonstrate (b) (6) material to his claim. Rather, the evidence is a continuation of conditions presented to the Immigration Judge at the respondent's hearing. Compare Motion to Reopen, 2014 Country Report on India with Exhibit 9, 2009 Country Report on India. Moreover, the additional evidence is insufficient to demonstrate that the respondent is prima facie eligible for relief. (b) (6) Since the additional evidence has not satisfied the requirements of reopening, the motion is denied as untimely.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Seattle, WA

Date:

JUN 14 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ann K. Wennerstrom, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: (b) (6)

The respondent, a native and citizen of Kenya, appeals the Immigration Judge's July 21, 2015, decision denying the respondent's application for (b) (6) while granting her applications for (b) (6). See sections (b) (6) of the Immigration and Nationality Act, (b) (6). The appeal will be sustained.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge erred in concluding that the respondent did not demonstrate (b) (6) sufficient to excuse (b) (6) (I.J. at 5-7). The respondent and her therapist testified that her life in the United States from the time she entered in (b) (6) 2007 until she filed her (b) (6) application in March 2010 was characterized by a series of traumatic incidents and living situations and by poor advice concerning her immigration status (I.J. at 4-7; Tr. at 79-105, 201-02, 217-19). The therapist testified that various events during this time repeatedly triggered and exacerbated the respondent's diagnosed posttraumatic stress disorder ("PTSD") and caused her great difficulty in facing and addressing (b) (6) to Kenya (I.J. at 4-5; Tr. at 201, 218-19). This testimony was corroborated by the testifying therapist's written declaration and evaluations completed by two other mental health professionals (Exh. 4 at 14-19, 81-83, 86-90). In discounting the therapist's testimony and finding that the respondent appears to have been functioning well in American society prior to filing her application, the Immigration Judge did not adequately address these traumatic incidents that the respondent experienced in the United States and that negatively affected her ability to timely apply for (b) (6). Therefore, on our de novo review we conclude that the respondent established (b) (6) relating to

(b) (6)

her (b) (6) in (b) (6) application. Sections (b) (6) of the Act; (b) (6) (specifying that (b) (6) include (b) (6), including any (b) (6)).

The Immigration Judge also erred in finding that, assuming the respondent established (b) (6), she did not (b) (6) given those (b) (6) (I.J. at 7). As noted above, the respondent's credible testimony, the testimony of her therapist, and the documents completed by her therapist and two other mental health professionals demonstrate that the respondent suffered from chronic PTSD and other mental health issues during the approximately 3 years between her arrival in the United States and the filing of her (b) (6) application. Further, the respondent credibly testified that she suffered a series of traumatic events and other setbacks throughout this time period, including receiving bad advice from the first immigration attorney she contacted, and her therapist testified that these events exacerbated her PTSD symptoms, especially her avoidance of anything that would cause her to think about returning to Kenya.

The Immigration Judge is correct in stating that ineffective assistance of counsel may provide a basis for excusing a (b) (6) where the alien complies with the applicable regulatory requirements (I.J. at 6). See (b) (6). However, regardless of whether the attorney's actions are formally cognizable as ineffective assistance of counsel, the respondent and her therapist testified that the bad legal advice the respondent received was one of the incidents that triggered her avoidance symptoms and contributed further to delay that is ultimately attributable to the respondent's PTSD (Tr. at 101-02, 202).

The Immigration Judge clearly erred in finding that the respondent first sought legal advice in 2008 (I.J. at 6). The record indicates that she contacted the first attorney in 2009 or 2010, several months before contacting the attorney who ultimately helped her file (b) (6) application, which was received by United States Citizenship and Immigration Services on March 31, 2010 (Tr. at 101-02; Exh. 3 at 63-64; Exh. 2). The respondent was also active in seeking mental health services during the early part of 2010, and she testified that she was then able to apply for (b) (6) because at that time her "mind was now getting straight" (Tr. at 101; Exh. 4). Therefore, we conclude that the respondent filed her (b) (6) application within a reasonable period of her seeking and receiving mental health services that treated her PTSD symptoms, specifically the avoidance that affected her ability to apply for (b) (6).

Ultimately, we conclude that the respondent's (b) (6) was reasonable given these (b) (6), and we therefore reverse the Immigration Judge's determination that the respondent did not establish (b) (6). Because we find no error in the Immigration Judge's grant of the respondent's application for (b) (6), which the Department of Homeland Security does not challenge on appeal, and because we find that on this record the respondent has demonstrated that she is deserving of a discretionary grant of (b) (6), we will sustain the respondent's appeal and remand to the Immigration Judge for the entry of an order granting the respondent's application for (b) (6) assuming successful completion of the required background checks. Given this result, we decline to address the remainder of the respondent's appellate arguments.

ORDER: The appeal is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).



FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would not find the Immigration Judge's findings of fact that undergird his conclusion that the (b) (6) application is (b) (6) (I.J. at 4-7) are clearly erroneous.

Falls Church, Virginia 22041

Files: (b) (6) – Boston, MA
(b) (6)

Date: NOV 20 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Kerry E. Doyle, Esquire

APPLICATION: Reopening

ORDER:

The pending motion is denied. The final administrative order of removal in these proceedings was entered by the Board on April 29, 2014.¹ Thereafter, on October 10, 2014, the Board denied the respondents' motion for reconsideration and reopening. On August 7, 2015, the respondents filed the present motion requesting administrative closure based on their asserted eligibility for Temporary Protected Status ("TPS"). However, the respondents' motion is both untimely filed and number barred and is denied on that basis. See section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The motion has not been shown to satisfy any exception to the filing requirements imposed by law on motions to reopen removal proceedings. The respondents' asserted eligibility for TPS does not establish any exception to the applicable filing requirements.

Moreover, a grant of TPS, which the respondents have not yet received, in and of itself does not compel or support administrative closure. Notably, the Board's decision to deny the respondents' motion as untimely does not affect the respondents' eligibility for TPS; insofar as they are eligible for, are granted, and maintain that status, the Department of Homeland Security is precluded from removing the respondents from the United States, even with an administratively final order of removal. See 8 C.F.R. § 1244.10(f)(2)(i).

Finally, on this record, we are not persuaded that reopening is warranted in the exercise of discretion under the Board's sua sponte authority. Accordingly, the respondents' motion is denied.



FOR THE BOARD

¹ The respondents' motion indicates that a petition for review of this decision is pending before the United States Court of Appeals for the First Circuit. The parties should advise the First Circuit of the entry of this order

Falls Church, Virginia 22041

File: (b) (6) - San Diego, CA

Date:

In re: (b) (6)

NOV 12 2015

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: (b) (6)

This case is before the Board pursuant to a (b) (6), 2015, order of the United States Court of Appeals for the Ninth Circuit, which remanded the case for reconsideration of the respondent's (b) (6), in light of intervening Ninth Circuit and Board precedent.¹ The respondent's appeal will be dismissed.

The respondent is a native and citizen of Mexico who (b) (6), loosely referred to as (b) (6) (I.J. at 5-6). *See also* Respondent's Jul. 13, 2010, Brief to the Board ("Brief") at 36-42.

An applicant seeking relief based on (b) (6) must establish that (b) (6) is, among other things, "(b) (6)" (b) (6) (BIA 2014); *accord* (b) (6) (BIA 2014). The (b) (6) is a unique and dispositive requirement of the (b) (6). *Id.* (explaining that a (b) (6) must share (b) (6)); *see also* (b) (6) (9th Cir. 2013) (explaining that the (b) (6)). To establish that (b) (6), "it must be (b) (6) (explaining that, "[t]he ultimate question is whether (b) (6) in question, as a (b) (6) (quoting (b) (6) (BIA 2008).

The respondent's (b) (6). According to the respondent's description and the evidence offered, (b) (6) may include a (b) (6). *See* Brief at 36-42

¹ In its order, the Ninth Circuit upheld our denial of cancellation of removal, (b) (6), and the respondent's request for a continuance and (b) (6). Therefore, those claims are not before us.

(b) (6)

(explaining generally that (b) (6) because of (b) (6)). Based on this (b) (6) may not agree on how (b) (6) and therefore (b) (6) . See *id.* at 223 (holding (b) (6) from the United States to El Salvador (b) (6)); see also (b) (6) (9th Cir. 2010) (holding (b) (6) from the United States are (b) (6)).

For example, contrary to (b) (6) in (b) (6) , people (b) (6) , which was accepted by the Ninth Circuit as (b) (6) , the respondent does not offer an (b) (6) in a way that would delimit (b) (6) . *Id.* at 1093 (explaining that (b) (6) through court records documenting (b) (6) testimony"). Accordingly, we conclude that (b) (6) under the Act.

We also conclude that the respondent has not established that (b) (6) in Mexico. In reaching this conclusion, we have examined the respondent's country condition evidence describing (b) (6) that have (b) (6) in Mexico and of (b) (6) in that country (b) (6) . (Exh. 16 at 91-110). To the extent the respondent argues that he could be (b) (6) on this basis, we hold that this argument is too speculative, and the evidence too inconclusive, to allow the respondent to meet (b) (6) necessary to establish his eligibility for (b) (6) . See *e.g.* (b) (6) (9th Cir. 2003) (rejecting Petitioner's (b) (6) claim as too speculative under the (b) (6) , where Petitioner (b) (6) that Ukraine would return (b) (6) , but submitted no specific evidence that such a change was likely). Furthermore, as the Immigration Judge properly held, while the record evidence in this case demonstrates that there is (b) (6) to Mexico, (b) (6) . See *e.g.* (b) (6) (9th Cir. 1995) ("(b) (6) .").

Based on the foregoing, the respondent has not demonstrated that he (b) (6) in Mexico on (b) (6) . Therefore, the respondent has not established eligibility for (b) (6) under the Act. We will dismiss the appeal.

ORDER: The appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Antonio, TX

Date:

FEB 23 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Louie I. Leeder, Esquire

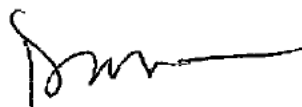
APPLICATION: Reopening

This matter was last before the Board on July 12, 2012, when we dismissed the respondent's appeal from the Immigration Judge's decision denying her applications for (b) (6), and (b) (6). On November 13, 2015, the respondent filed a motion to reopen. The motion will be denied.

With certain exceptions, an alien is entitled to file one motion to reopen and the motion must be filed not later than 90 days after the final administrative order. See section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). The respondent's motion was filed long after the 90-day filing period expired. Furthermore, the respondent does not assert that the motion falls within any exception to the filing requirements. Instead, the respondent seeks to have the Board reopen proceedings sua sponte. See 8 C.F.R. § 1003.2(a). She states that proceedings should be reopened and then terminated so that she may pursue a provisional unlawful presence waiver (Form I-601A), which is for aliens who must travel abroad to obtain an immigrant visa from the Department of State. The respondent explains that her United States citizen husband filed a visa petition on her behalf and that it is pending with the U.S. Citizenship and Immigration Services (USCIS).

The respondent, however, is not currently eligible for a provisional unlawful presence waiver. The waiver is not available to an alien unless he or she is the beneficiary of an approved immediate relative petition. See 8 C.F.R. § 212.7(e)(3)(iv). The respondent's motion does not demonstrate that reopening these proceedings under our discretionary sua sponte authority would be warranted. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).¹

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

¹ Any request for a favorable exercise of prosecutorial discretion must be directed to the Department of Homeland Security.

Falls Church, Virginia 22041

File: (b) (6) – Seattle, WA

Date: OCT 15 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Peter Hurtado, Esquire

APPLICATION: (b) (6)

This case is before the Board pursuant to a (b) (6), 2015, order of the United States Court of Appeals for the Ninth Circuit, which remanded the case for reconsideration of the respondent's (b) (6) claim in light of intervening Ninth Circuit and Board precedent. In addition, it appears as if the respondent may have been (b) (6) at the time of his arrival in the United States.

On remand, the Immigration Judge should determine if the respondent should be allowed to apply for (b) (6) with the United States Citizenship and Immigration Services (CIS) under the (b) (6) (enacted (b) (6)), since the respondent may have been (b) (6) at the time that he applied for (b) (6).¹ As further fact-finding may be required, the record will be remanded to the Immigration Judge to determine if the (b) (6) applies to the respondent's case and to take any appropriate action.

If the (b) (6) does not apply, then further proceedings should address the respondent's eligibility for relief, including further fact-finding if needed, and analysis of the respondent's (b) (6) claim under applicable precedent. At the remanded hearing, both parties shall be provided with an opportunity to present additional evidence, both testimonial and documentary. Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings and the entry of a new decision.


FOR THE BOARD

¹ The (b) (6) provides that the CIS shall have initial jurisdiction over any (b) (6) application filed by an (b) (6). The (b) (6) applies to all aliens in immigration proceedings, as well as to those aliens with petitions for review in the federal courts, which were pending as of the date of enactment. Section (b) (6).

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date:

JUN 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jose Bernardo Lovo, Esquire

ON BEHALF OF DHS: Richard Jurgens
Assistant Chief Counsel

APPLICATION: Reconsideration

This case was last before us on March 29, 2016, when we affirmed a decision from an Immigration Judge denying the respondent's request for a waiver of the joint petition requirement under section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1186(c)(4)(B). On April 25, 2016, the respondent filed a timely motion to reconsider. The Department of Homeland Security (DHS) opposes the respondent's motion, which will be denied. We, however, will reconsider our decision on our own motion and again will affirm the Immigration Judge's decision.

A party seeking reconsideration requests that the Board's decision be reexamined in light of alleged legal or factual errors, a change of law, or an argument or aspect of the case that was overlooked. See 8 C.F.R. § 1003.2(b); see also *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006). The respondent contends that the Board erred in dismissing his appeal, arguing that the DHS did not meet its burden of proof regarding the denial of his petition and that the Immigration Judge made certain factual errors in her decision.

The respondent's arguments do not provide a proper basis for reconsidering our prior ruling in his case. See generally *Matter of O-S-G-*, *supra* (indicating that a motion to reconsider is neither a vehicle for advancing supplemental legal arguments that could have been raised previously nor a mechanism for submitting a late-filed brief). To begin, the respondent's motion to reconsider focuses primarily upon the Immigration Judge's decision rather than identifying errors present in the Board's decision. Moreover, each argument presented in the respondent's motion could have been raised on appeal or was previously raised and duly considered in our decision dismissing that appeal. We therefore deny the respondent's motion to reconsider.

We, however, will reconsider our prior decision *sua sponte* because there is a legal, yet ultimately harmless, error in that ruling.¹ Our decision found that the DHS had met its burden of showing, by a preponderance of the evidence, that the respondent's joint petition was properly

¹ We note that the respondent has not raised the error in his motion.

denied. See (b) (6) (BIA March 29, 2016). This was in error because the respondent did not file a joint petition to remove conditional nature of his status. Rather, he requested a waiver of the joint petition requirement under section 216(c)(4)(B) of the Act.

In cases dealing with a denial of a joint petition to remove conditional status, the DHS has the burden of proving that the petition was properly denied. See *Matter of Mendes*, 20 I&N Dec. 833, 838 (BIA 1994). In cases dealing with a denial of a waiver of the joint petition requirement, as is the case here, the alien has the burden of proof to establish eligibility for the waiver. *Id.* Because we mistakenly addressed the respondent's appeal as if it involved a joint petition rather than a waiver of the joint petition requirement, we imposed the wrong burden of proof while affirming the Immigration Judge's determination. This error, however, is harmless. By placing the burden on the government, we imposed a higher burden of proof than required. When the burden is properly placed on the respondent, we still find no error in the Immigration Judge's decision and affirm her reasoning and determination that the respondent did not meet his burden of establishing eligibility for a waiver under section 216(c)(4)(B) of the Act.

ORDER: The respondent's motion to reconsider is denied, but we reconsider our decision dated March 29, 2016, on our own motion.

FURTHER ORDER: The Immigration Judge's decision dated October 23, 2014, is affirmed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

MAY 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sheen M. Na, Esquire

APPLICATION: Reopening

This matter was last before the Board on July 22, 2011, when we denied the respondent's motion to reconsider our decision, dated March 10, 2011, in which we dismissed his appeal of the Immigration Judge's decision denying his applications for (b) (6). On March 16, 2016, the respondent, a native and citizen of El Salvador, filed the instant motion to reopen. The Department of Homeland Security has not filed an opposition. The motion to reopen will be denied.

With certain exceptions, an alien is entitled to file one motion to reopen and the motion must be filed no later than 90 days after the final administrative order. *See* section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). Because the respondent filed this motion more than 5 years after the entry of his final administrative order, it is untimely. The respondent, however, argues that his motion falls within an exception to the filing requirement.

In this regard, the respondent contends that equitable tolling should apply because he received ineffective assistance of counsel. Namely, he alleges that his former attorney incorrectly informed the Immigration Judge that the respondent was ineligible for Temporary Protected Status ("TPS") (Respondent's Motion at 4, 6-9). He claims that, due to this inaccurate concession, the Immigration Judge found that he had not established an (b) (6) and denied his application on this basis (Respondent's Motion at 4, 6-9).¹ *See* (b) (6). The respondent also requests sua sponte reopening (Respondent's Motion at 9-10).

At the outset, we note that the respondent does not meaningfully assert that he acted with due diligence in discovering the alleged ineffective assistance of his former attorney. *See Avagyan v.*

¹ The respondent also alleges that he was defrauded by a notario, who failed to file his TPS application in 2001 (Respondent's Motion at 3, 9). We previously considered this claim, however, and agreed with the Immigration Judge's determination that it did not constitute an (b) (6) the respondent's (b) (6) application. Further, it does not otherwise provide a basis for reopening.

Holder, 646 F.3d 672, 679 (9th Cir. 2011) (stating that an alien “is entitled to equitable tolling of the deadline during periods when [he] is prevented from filing because of a deception, fraud, or error, as long as [he] acts with due diligence in discovering the deception, fraud or error”) (internal quotation marks and citations omitted).²

Moreover, the respondent has not demonstrated substantial compliance with *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). A *Lozada* motion must (1) be supported by an affidavit setting forth in detail the agreement that the alien entered into with his counsel; (2) show that the alien’s counsel has been informed of the allegations leveled against her and has been given an opportunity to respond; and (3) reflect whether a complaint has been filed with the appropriate disciplinary authorities, and if not, why not. *Id.* at 639. The respondent has not submitted evidence indicating (1) that he informed his counsel of the allegations leveled against her or (2) that he filed a complaint against his counsel with the appropriate disciplinary authorities. *See id.*; cf. *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-32 (9th Cir. 2013) (noting that the third *Lozada* factor is hortatory).

The respondent contends that his lack of compliance with *Matter of Lozada*, *supra*, is not fatal to his claim because the record clearly shows ineffective assistance (Respondent’s Motion at 6). *See Hernandez-Mendoza v. Gonzalez*, 537 F.3d 976, 978-79 (9th Cir. 2007). This claim, however, is not supported by the record. In particular, the record does not support the respondent’s claim that his attorney erred in conceding his ineligibility for late-filed TPS as it does not appear that the respondent met the requirements for late filing. *See* 8 C.F.R. § 244.2(f)(2).³

Moreover, an alien’s mere filing of an application for TPS is not an (b) (6) applications. *See* (b) (6). The attorney’s concession therefore did not affect the respondent’s eligibility for (b) (6) and, as such, the respondent has not demonstrated that he suffered prejudice on account of his attorney’s conduct.⁴

² We note in this regard that the United States Court of Appeals for the Ninth Circuit dismissed the respondent’s petition for review on (b) (6) 2014, noting, *inter alia*, that it was without jurisdiction to consider the respondent’s ineffective assistance of counsel claim because he did not exhaust the issue before the Board. Yet the respondent did not file the present motion until over 18 months after the Ninth Circuit’s order.

³ Pursuant to 8 C.F.R. § 244.2(f)(2), an alien may be eligible for late-filed TPS if, during the initial filing period, the alien (1) was in valid nonimmigrant status or had been granted voluntary departure or any relief from removal, (2) had an application for change of status, adjustment of status, (b) (6) voluntary departure, or any relief from removal that was pending or subject to further review or appeal, (3) was a parolee, or had a pending request for reparole, or (4) was the spouse or child of an alien currently eligible to be a TPS registrant.

⁴ The respondent’s argument that the filing of his TPS application on “8/26/1996” provides an exception to (b) (6) is not supported by the record (Respondent’s Motion at 9). The respondent in fact filed his application on August 17, 2006 (Respondent’s Motion, Tab A). Further, as we noted above, the filing of an application for TPS or the potential eligibility for this (continued...)

(b) (6)

See Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008). He thus has not established that reopening is warranted on the basis of ineffective assistance of counsel.

Further, the respondent has not met his burden of establishing that sua sponte reopening is appropriate. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (stating that our discretion to reopen sua sponte is limited to cases where exceptional circumstances are demonstrated). The respondent has not submitted evidence to support his assertions that exceptional circumstances exist in his case. Accordingly, we deny the respondent's motion to reopen as untimely.

ORDER: The respondent's motion to reopen is denied as untimely.



FOR THE BOARD

(...continued)

form of relief, without more, does not constitute (b) (6) excusing the alien's failure to file his (b) (6) application in (b) (6). *See* (b) (6)

Falls Church, Virginia 22041

File: (b) (6) – Bloomington, MN

Date:

In re: (b) (6)

NOV - 4 2015

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: W. John Vandenberg, Esquire

APPLICATION: Reopening

This case was previously before the Board on May 29, 2015, when we dismissed the respondent's appeal. The respondent has filed a timely motion to reopen seeking an opportunity to pursue an application for adjustment of status based on her (b) (6), 2015, marriage to a United States citizen. The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be denied.

The motion to reopen will be denied because the respondent has not established prima facie eligibility for adjustment of status, i.e., she has not presented clear and convincing evidence indicating a strong likelihood that her marriage is bona fide. *See Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002). We acknowledge that the respondent has presented some evidence regarding the nature of her marriage, including a copy of a visa petition, the adjustment application, her husband's birth certificate, her divorce decree, her husband's two divorce decrees, a bank statement, and some photographs. However, the respondent has not submitted documents showing joint ownership of property, a lease showing joint tenancy, birth certificates of children born to the beneficiary and the petitioner, or affidavits of third parties having knowledge of the bona fides of the marriage. *Cf. Velarde, supra*; 8 C.F.R. § 204.2(a)(1)(iii)(B). Consequently, the respondent has submitted insufficient evidence to demonstrate her prima facie eligibility for relief from removal. Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Seattle, WA

Date:

APR 13 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Kristin S. Kyrka, Esquire

ON BEHALF OF DHS: Mark Hardy
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has timely filed a motion to reopen seeking further consideration of his application for (b) (6) based on the evidence now provided.¹ The motion, which is opposed by the Department of Homeland Security, will be denied.

The respondent is a (b) (6)-year-old citizen of El Salvador. In moving to reopen, he once again explains that he was (b) (6) and that since his departure (b) (6). It is contended that on (b) (6) 2015, (b) (6) in El Salvador (b) (6) the respondent. When his father (b) (6) and (b) (6) him. The respondent also indicates that he has (b) (6) but that (b) (6). Further, he contends that one of his sisters (b) (6) the area. Motion, Exh. B at 29-31 (respondent's declaration).

The respondent has no (b) (6) because he was in the United States at the time (b) (6). To corroborate these claims, he has submitted a copy (and translation) of a (b) (6), along with letters purportedly from his father's life partner, and the respondent's sister in El Salvador. Motion, Exh. B at 34-37 (b) (6) and translation) and 38-42 (two letters and translations). The authenticity of this evidence (allegedly originating in El Salvador) has not been sufficiently demonstrated. The respondent has not explained how he came into possession of any of this material, and absent

¹ In the prior proceedings, the respondent did not apply for (b) (6) and his applications for (b) (6) were denied. See Tr. at 8, 66; IJ. dec. at 3-7; Board dec. at 1-3. In his current motion, the respondent seeks further consideration solely of his application for (b) (6). Motion to Reopen (Motion) at 6-11.

from his submissions is any evidence documenting that it was transmitted to him from El Salvador by mail or by another manner.

In addition, although the submitted (b) (6) was purportedly issued by the (b) (6) it has not been authenticated in accordance with 8 C.F.R. § 1287.6, or by other means. As to the two letters (which are written in Spanish), no proof has been provided confirming the identity of either author. Moreover, it appears highly likely that these letters were written by the same individual (not by two separate individuals), given the similarity in handwriting used in each letter, which bears the same unique characteristic (e.g., repeatedly using small circles to dot the letter "i"). Compare letter by (b) (6) (letter from (b) (6)) with letter by (b) (6) (reflecting this practice in both letters, including when referring to "Estados Unidos (b) (6)" in each letter). No explanation for this circumstance has been provided. It is also unclear whether the letter from (b) (6) was actually personally signed.

Further, the respondent's account of his (b) (6) concerning his father's (b) (6) and obtaining a (b) (6) are vague. In any event, the respondent's claims as to this issue are uncorroborated, and the evidence submitted does not otherwise demonstrate that the (b) (6) or have (b) (6), the (b) (6) of his father.²

The respondent also maintains that shortly after his father's (b) (6) on (b) (6) here in the United States, and (b) (6). Motion, Exh. B (respondent's declaration). However, (b) (6) in this regard are speculative, as he does (b) (6). He did (b) (6), and (b) (6). As such, these claims do not support reopening.

In addition, the respondent has not shown prima facie eligibility for (b) (6) based on the (b) (6) reported in the updated (b) (6) now provided. Motion at 43-105. Moreover, it has not been made clear how the (b) (6) discussed in this material differ significantly from those existing at the time of the respondent's hearing, such that reopening potentially might be warranted based on this evidence alone, or in conjunction with his other submissions discussed above.

The respondent has not satisfied his "heavy burden" of demonstrating that if his proceedings were reopened, the evidence now presented would alter the disposition reached regarding his application for (b) (6) which requires a showing that (b) (6).

² There also are seeming inconsistencies in the respondent's submissions concerning the (b) (6) which have not been adequately explained. Compare (b) (6) (indicating that the respondent's father "(b) (6) Entry through (b) (6) with letter from (b) (6) (suggesting that the respondent's father (b) (6) when he was outside his house).

(b) (6)

(b) (6)

upon returning to his homeland. (b) (6)

(BIA 1992); (b) (6)

(9th Cir. 2010).

Accordingly, the motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: FEB 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (conceded)

APPLICATION: (b) (6)

The respondent, a native and citizen of China, has appealed from the Immigration Judge's July 29, 2014, decision to deny his application for (b) (6). Sections (b) (6) and (b) (6) of the Immigration and Nationality Act, (b) (6). While this appeal was pending, the respondent submitted additional evidence, which we will construe as a motion to remand. The Department of Homeland Security has not filed its opposition to the appeal, nor has it responded to the respondent's motion to remand. The appeal will be sustained and the record will be remanded for further proceedings. The respondent's motion to remand will be denied as moot.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, judgment, and discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent filed his application for relief from removal after May 11, 2005, it is subject to the relevant provisions of the REAL ID Act of 2005. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 389 n.8 (BIA 2014).

The respondent conceded his removability (I.J. at 2; Tr. at 2-3), and thus the only issue on appeal is the respondent's eligibility for relief from removal. The respondent asserts that he was (b) (6) in China (b) (6) (I.J. at 2-11; Exh. 3; Exh. 3A at 1-3; Tr. at 27-90, 104). The respondent claims that he will (b) (6) if he is removed to China (b) (6) (I.J. at 2-11; Exh. 3; Exh. 3A at 1-3; Tr. at 27-90, 104). On appeal, the respondent contends that the Immigration Judge erred in denying his application for (b) (6) based on an adverse credibility determination and for a lack of corroborative evidence (Respondent's Brief at 2-19).

We will reverse the Immigration Judge's adverse credibility determination because it is clearly erroneous (I.J. at 11-16; Exh. 4A at Tab C; Tr. at 32-33, 57-66; 69-73, 80-94). See *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (noting that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (internal quotation marks omitted)). The Immigration Judge first found internal inconsistencies in the respondent's testimony regarding the precise dates, in (b) (6) 2008, when he returned to, and (b) (6) (I.J. at 11-13). However, the respondent explained any inconsistencies in this regard by testifying that he could not remember precise dates because the events described had occurred approximately 6 years ago (Tr. at 88-89). Further, even though the respondent could not recall the precise dates for each event, the respondent consistently testified that he had been (b) (6) a few days later, and was thereafter informed that he (b) (6) (Tr. at 32-33, 57-61, 80-89).

We conclude that the Immigration Judge's finding that the respondent's testimony is internally inconsistent with regard to the dates he returned to work and (b) (6) to be clearly erroneous because the conflict in dates was a "trivial discrepancy" that, "under the totality of the circumstances [has] no bearing on [the respondent's] veracity." See *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1092 (9th Cir. 2014) (first bracket in original) (reversing an adverse credibility determination that was based on a conflict of dates in an alien's testimony, finding such a conflict to be an "utterly trivial discrepancy"). Moreover, although the Immigration Judge mentions the respondent's explanation for this alleged inconsistency in passing, she does not analyze whether it was reasonable that the respondent could not remember the precise dates from events that transpired about 6 years ago (I.J. at 11-13). See *id.*, at 1092-93 ("An [Immigration Judge] must consider and address '[a]ll plausible and reasonable explanations for any inconsistencies' that form the basis of an adverse credibility determination." (citation omitted)). For these reasons, we conclude the Immigration Judge's findings regarding this alleged inconsistency to be clearly erroneous (I.J. at 11-13; Tr. at 32-33, 57-61, 80-89). See *Matter of R-S-H-*, *supra*.¹

Because there is clear error in Immigration Judge's finding regarding the date the respondent (b) (6) we also find clear error in the Immigration Judge's related finding that the respondent's testimony that he was (b) (6), 2008, is inconsistent with his testimony that he planned to take a (b) (6), dated (b) (6), 2008, to his boss before he was (b) (6) (I.J. at 13; Tr. at 109-15). Again, the Immigration Judge did not address the reasonableness of the respondent's explanation for this inconsistency, namely, that the events underlying his application transpired 6 years ago and that he could not recall the exact dates he (b) (6)

¹ Additionally, the Immigration Judge's finding that the respondent inconsistently testified about the name of his employer from 1998 to 2008 is not borne out by the record and is clearly erroneous (I.J. at 11, 17; Tr. at 32, 77-78).

(b) (6)

(b) (6) (Tr. at 88-89, 115). See *Ai Jun Zhi v. Holder, supra*.

After the respondent testified that there is (b) (6) in China and that he was able, as a (b) (6), the Immigration Judge asked the respondent a series of leading questions, inquiring whether any official document can be obtained through (b) (6) (Tr. at 90-94). The Immigration Judge then asked the respondent whether he had (b) (6), evidencing his (b) (6) (Tr. at 92-94). The respondent repeatedly denied obtaining (b) (6) and stated that he was (b) (6) in China, (b) (6) as documented in (b) (6), and that he continues to (b) (6) (Tr. at 93-94, 112). Despite this testimony, the Immigration Judge concluded that, due to the respondent's testimony regarding the presence of (b) (6) in China, the respondent must have obtained (b) (6) "by way of some (b) (6)" (I.J. at 16). This finding is speculative and clearly erroneous (I.J. at 6; Exh. 4A at Tab C). It is well established that speculation and conjecture cannot support an adverse credibility finding. See, e.g., *Li v. Holder*, 559 F.3d 1096, 1103-07 (9th Cir. 2009).

Next, the Immigration Judge found internal inconsistencies in the respondent's testimony regarding the source of the (b) (6) (I.J. at 13-15). While questioning the respondent about the source of (b) (6), the Immigration Judge noted that "most husbands would ask their wives" about the source of such money (Tr. at 65-66). Apart from being premised on speculation, the Immigration Judge's finding is clearly erroneous because the respondent consistently testified that the money was from his and his wife's savings, although he was unsure whether this (b) (6) or withdrawn from the bank (Tr. at 63-66). Because this inconsistency is minor and the Immigration Judge's findings relating to this inconsistency are speculative, we conclude that the Immigration Judge's finding is clearly erroneous and cannot support an adverse credibility determination (I.J. at 13-15). See *Li v. Holder, supra*. Further, the Immigration Judge's finding that the respondent was "all over the place" regarding why he did not (b) (6) is clearly erroneous because it is not borne out by the record (I.J. at 13-14; Tr. at 59-63). After being asked a series of clarifying questions, the respondent explained that he never sought (b) (6) because he knew (b) (6) would not provide him with one, even if it was requested (Tr. at 59-63).

In addition, the Immigration Judge's finding that the respondent, following (b) (6) is speculative and clearly erroneous (I.J. at 15-16).⁴ The Immigration Judge found it implausible that the respondent

² The Immigration Judge's finding that the respondent inconsistently testified about whether he had actually visited his friend (b) (6) is clearly erroneous (see Tr. at 68-75 (stating that the respondent did not see his friend for approximately one month and then visited him on multiple occasions)). Moreover, the Immigration Judge never sought an explanation from the respondent for it. See *Ai Jun Zhi v. Holder, supra* (finding that an Immigration Judge could not properly base her adverse credibility determination on an alleged inconsistency "without first soliciting his explanation").

would have visited his friend, who was arrested alongside the respondent for (b) (6), because the respondent was (b) (6) following his (b) (6) (I.J. at 15-16). In fact, the Immigration Judge stated during proceedings “you had to (b) (6) once a week, [sic] you’re telling us that you were (b) (6), and yet you went to this person’s home. Hum. Is that right? Seems (b) (6) that if all of this had happened” (Tr. at 70). Insofar as the Immigration Judge’s implausibility finding is premised on her personal conjecture about what constituted (b) (6), it is speculative and cannot support an adverse credibility finding. See (b) (6) (9th Cir. 2004) (holding that an Immigration Judge’s personal conjecture about what the Chinese (b) (6) under certain circumstances could not support an adverse credibility finding). Moreover, the respondent was (b) (6), not for having friends, and, as the Immigration Judge properly acknowledged, the respondent (b) (6) (I.J. at 15; Tr. at 69-73). We will therefore reverse the Immigration Judge’s adverse credibility finding because it is clearly erroneous (I.J. at 11-16; Exh. 4A at Tab C; Tr. at 32-33, 57-66; 69-73, 80-94). *Matter of R-S-H*, *supra*.

With regard to corroboration, the Immigration Judge found that the respondent failed to submit a letter from (b) (6) in the United States corroborating that he (b) (6) (I.J. at 16-17). When asked why he did not present a letter, the respondent stated that he did not realize that it was needed because he was (b) (6) (Tr. at 104). The respondent then stated that he would be able to submit a letter at a later time, but the Immigration Judge declined to continue proceedings, stating that “today’s the day of the hearing” (Tr. at 104). In so doing, the Immigration Judge neglected to determine whether there was good cause to continue proceedings for the submission of the letter from the respondent’s (b) (6). See *Ai Jun Zhi v. Holder*, *supra*, at 1095 (reversing an adverse credibility determination and holding that an Immigration Judge erred when she did not provide notice to the alien that he was required to present the corroborative evidence she referred to in her decision); *Ren v. Holder*, 648 F.3d 1079, 1090-92 & n. 13 (9th Cir. 2011) (holding that an Immigration Judge must provide an otherwise credible applicant with “notice and an opportunity to either produce the evidence or explain why it is unavailable”).

Furthermore, insofar as the Immigration Judge’s other findings regarding the lack of corroboration are dependent upon her adverse credibility determination (I.J. at 17), which we have found to be clearly erroneous, we will reverse the Immigration Judge’s determination that the respondent provided insufficient corroborative evidence to meet his burden of proof for purposes of (b) (6). See section (b) (6) of the Act. Because the Immigration Judge denied the respondent’s application for (b) (6) based on an adverse credibility determination and a lack of corroborative evidence, the respondent’s appeal will be sustained and the record will be remanded for consideration of the merits of the respondent’s claim.³ Because we are remanding this case for the reasons set for the above, the respondent’s motion to remand will be denied as moot.

³ For this reason, we need not address the respondent’s appellate arguments regarding the merits of his claim at this time (Respondent’s Brief at 19-29).

On remand, the Immigration Judge should consider the merits of the respondent's application for (b) (6). The parties will have an opportunity on remand to provide additional evidence and arguments regarding the respondent's eligibility for (b) (6) and for any other relief from removal for which he may be eligible. We express no opinion regarding the outcome on remand. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings and the entry of a new decision consistent with the foregoing opinion.

FURTHER ORDER: The respondent's motion to remand is denied as moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Denver, CO

Date: SEP 10 2015

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Adam L. Crayk, Esquire

ON BEHALF OF DHS: Kalin Ivany
Assistant Chief Counsel

This case was last before us on May 4, 2015, at which time we granted the respondent's motion to reopen proceedings and remanded the record for further proceedings. The Department of Homeland Security (DHS) has filed, on June 3, 2015, a motion to reconsider this decision. The respondent has filed a brief in response to the motion, which will be denied.

We do not find that the DHS has articulated any error in law or fact which would persuade this Board to disturb our prior decision. *See generally Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). The DHS argues that we erred in finding that the respondent's case should be remanded for further proceedings because we misinterpreted the District Court's 2011 vacatur, and because the respondent was legally deported at the time of his hearing. As an initial matter, we agree with the DHS that the District Court of the Third Judicial Circuit for Salt Lake County, Utah did not find specific evidence of constitutional infirmity in the respondent's criminal proceedings "due to the age of the case and other surrounding circumstances". However, it ultimately found "equally clear that the underlying facts known to all parties nearly seventeen years ago, supported a Class B misdemeanor resolution that ultimately anticipated dismissal." Thus, the District Court found it appropriate to vacate the respondent's conviction without a specific finding of constitutional infirmity. However, given the ambiguity surrounding the Court's vacatur, we continue to find it appropriate to apply the rule of lenity and construe such ambiguity in favor of the respondent. *See INS v. Errico*, 385 U.S. 214, 225 (1966) ("We resolve doubts in favor of [the alien] because deportation is a drastic measure."); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[W]e will not assume that Congress meant to trench on [the immigrant's freedom beyond that which is required by the narrowest of several possible meanings of the words used].")

Moreover, we find no reason to revisit our decision that the respondent's proffered evidence, in conjunction with the particular circumstances of the case, warrant a discretionary grant of his motion under our sua sponte authority pursuant to 8 C.F.R. § 1003.2(a). *See generally Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). The DHS' observation that the respondent's 1996 deportation order was valid when executed does not alter this decision. *See Matter of O-S-G-*, *supra*. Accordingly, the following order will be entered.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Philadelphia

Date:

JAN 31 2003

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James J. Orlow, Esquire

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] -
Entered without inspection

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] -
Convicted of controlled substance violation

Lodged: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Termination of proceedings; suspension of deportation; voluntary departure

The respondent appeals an Immigration Judge's May 7, 1998, decision finding him deportable as charged, and premitting his applications for suspension of deportation and voluntary departure.¹ The request for oral argument is denied. The Board will sustain the appeal, in part, and will dismiss the appeal, in part. The Board determines that the Immigration Judge erred in finding the respondent deportable under the lodged aggravated felony ground of deportability, but further determines that the appeal should otherwise be dismissed.

The respondent admitted the allegations in the Notice to Appear (NTA) (Exh. 1) that he is a native and citizen of Jamaica (Exh. 4). He does not contest the Immigration Judge's finding that he is deportable because he entered the United States without inspection in 1981. He admits that he was convicted by guilty plea in a court of the State of Pennsylvania in (b) (6) 1985 of delivery of a controlled substance in violation of section 780-113(a)(30) of Title 35 of the Pennsylvania Statutes (Exh. 7 at 2). The relevant statute has remained the same since the date of his conviction.

¹ The Immigration Judge denied the respondent's motion to terminate proceeding and request for a subpoena in a February 24, 1997, interlocutory order (Exh. 13).

A. CONTROLLED SUBSTANCE GROUND

The respondent challenges the Immigration Judge's determination that the Immigration and Naturalization Service proved by clear, convincing and unequivocal evidence that he is deportable under section 241(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(B)(i), because his 1985 conviction does not constitute a violation of a law "relating to" a controlled substance.

The Pennsylvania statute in question prohibits the delivery of a controlled substance or a "counterfeit controlled substance." The Immigration Judge found that it was clear to him that the respondent's conviction relates to a statute involving controlled substances notwithstanding the lack of specification of the substance in the respondent's judgment of conviction because a conviction necessarily means the substance was either a controlled substance or *a counterfeit comprised of one or more controlled substances* (emphasis added) (Exh. 13 at 2; Tr. at 21; Exh. 10 at 5).²

The respondent argues that someone can be convicted in Pennsylvania under subsection (30) for delivering an ordinary substance (such as baking soda) that has been packaged or labeled to resemble a controlled substance which is an offense not encompassed within the controlled substance ground of deportability (Exh. 9 at 2). Although the Board can find no decision of a Pennsylvania court defining the term "counterfeit controlled substance" used in section 780-113(a)(30), we conclude that the Immigration Judge's interpretation of the term to mean a substance that at least includes some controlled substance is reasonable.

The term "counterfeit" is broadly defined in the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act to mean a "controlled substance, other drug, device or cosmetic" that is falsely labeled to be manufactured, distributed, or dispensed by someone else. See 35 P.S. § 780-102. However, in section 780-113(a)(30), the word "counterfeit" directly modifies the term "controlled substance." This indicates that the word is used in a more restricted manner to denote a substance that contains some controlled substance. See also 21 U.S.C. § 802(7), defining the term "counterfeit substance" in a manner that requires that the substance be a "controlled substance." Interpreting the phrase in this way is consistent with the general definition of counterfeit since the person "creating, delivery or possessing with the intent to deliver" the counterfeit controlled substance as prohibited under subsection (30) is still misrepresenting the substance. Moreover, as noted by the Service, the passing off of a non-controlled substance as a controlled substance, which the respondent contends falls within subsection (30), is explicitly prohibited by a separate provision, subsection (35)(ii). See *Commonwealth v. Irby*, 700 A.2d 463, 465 (Pa. Super. Ct. 1997); *Commonwealth v. Dancy*, 650 A.2d 462, 466 (Pa. Super. Ct. 1994). This is a

² The Immigration Judge's decision not to rely upon the criminal complaint and the arrest report to establish the substance delivered by the respondent was reasonable due to the equivocal nature of the information in the documents (green, leafy substance that was allegedly marijuana) even if he could properly consider the documents in determining whether the Service had proven the conviction.

further indication that subsection (30) does not cover the sale of fake controlled substances. Finally, the respondent cites no decision of a Pennsylvania court revealing that someone has been convicted under subsection (30) for delivering an ordinary substance (such as baking soda) which has been packaged or labeled to resemble a controlled substance.

The Board has compared the federal and Pennsylvania schedules of controlled substances in effect at the time of the respondent's arrest and conviction. See 21 U.S.C. § 812; 35 P.S. § 780-104. Every controlled substance listed in the Pennsylvania schedules was listed in the federal schedules with slight variations between the schedules in the arrangement of a few controlled substances.³ The Board agrees with the Immigration Judge that a conviction for delivering a substance containing at least some controlled substance is a conviction "relating to" a controlled substance to establish the respondent's deportability under this ground. We believe this result is consistent with our prior decisions cited by the Service in its opposition to the Motion to Terminate (Exh. 10) and in the respondent's Supplemental Memorandum (Exh. 9), and with the "strong national policy [exhibited by Congress] to deport aliens convicted of drug offenses." *Matter of Esqueda*, 20 I&N Dec. 850, 853 (BIA 1994). Drug dealers who deliver less than the real thing are harmful to society just as those who sell the real thing. Cf., *Luu-Le v. INS*, 224 F.3d 911, 915-16 (9th Cir. 2000) (Arizona paraphernalia statute intending to criminalize behavior involving the production or use of drugs falls within the broadly worded "relating to" language).

B. AGGRAVATED FELONY GROUND OF DEPORTABILITY

The respondent argues that he is not deportable under the lodged aggravated felony ground of deportability because he was convicted before this ground was added to the Act. The Board need not address this argument because we determine that the Immigration Judge erred in finding that the respondent was convicted of an aggravated felony.

Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime." A state drug offense constitutes a 'drug trafficking crime' under 18 U.S.C. § 924(c)(2) if it is "(1) punishable under one of the three enumerated federal drug statutes and (2) a felony." *Matter of Yanez*, 23 I&N Dec. 390, 394 (BIA 2002).

We cannot determine from the record of conviction in this case whether the respondent was convicted of a felony or of a misdemeanor. It is possible under the Pennsylvania statute to be convicted of a misdemeanor and sentenced to a term of imprisonment not exceeding 1 year. See 35 P.S. § 780-113(f)(4). The maximum punishment for a first time conviction for distributing a schedule V controlled substance is a term of imprisonment of not more than 1 year. See 21 U.S.C. § 841(b)(3). Since we cannot find that he was convicted of either a state felony or a federal felony, we reverse the finding that the respondent was convicted of illicit trafficking of a controlled substance. See *Matter of Davis*, 20 I&N

³ The controlled substances are marihuana, amphetamine, phenmetrazine, methylphenidate, and methamphetamine.

Dec. 536, 541 (BIA 1992); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002). We therefore sustain the respondent's appeal regarding the lodged charge because the Service has not established that he was convicted of a drug trafficking crime. The respondent remains ineligible for voluntary departure because section 244(e) of the Act excludes aliens who are deportable due to conviction of a drug offense.

C. SUSPENSION OF DEPORTATION

The Immigration Judge pretermitted the respondent's application for suspension of deportation because he lacked the necessary period of continuous physical presence due to application of the stop-time rule found in section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1). (Oral Decision at 2-3). He calculated that the respondent had established less than 4 years of continuous physical presence between the date he entered the United States without inspection in January 1981 and the date of the commission of the drug offense in (b) (6) 1984. We affirm the Immigration Judge in this regard.

Even were the respondent's application for suspension to be considered under section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2), because he is deportable under section 241(a)(2)(B)(i) of the Act due to his conviction of a controlled substance violation, he would have to establish that he has been physically present in the United States for a continuous period of not less than 10 years immediately following his conviction. *See Matter of Lozada*, 19 I&N Dec. 637, (BIA 1998) (the ten year period is measured from the date of conviction, not the date the offense is committed, since it is the conviction, not the commission of the offense, that renders the alien deportable). Here the respondent was convicted in (b) (6) 1985 and the OSC was served upon the respondent in (b) (6) 1995. Therefore, under the stop-time rule in section 240A(d)(1), the respondent lacks the 10 years continuous physical presence required for suspension of deportation. *See Matter of Nolasco*, 22 I&N Dec. 632, 641 (BIA 1999); *see also Pinho v. INS*, 249 F.3d 183, 187 (3rd Cir. 2001) (agreeing with the Board that the stop-time rule applies in deportation proceedings); *but see Uspango v. Ashcroft*, 289 F.3d 226, 230 (3rd Cir. 2002) (suggesting in dicta that the stop-time rule may not apply to proceedings initiated prior to April 1, 1997).⁴ We therefore find no error in the Immigration Judge's finding that the respondent is ineligible for suspension of deportation.

The Board lacks the authority to consider the respondent's due process and ex post facto arguments. Accordingly, the Board enters the following order.

ORDER: The respondent's appeal is sustained with respect to the finding of deportability under section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, but is dismissed in all other respects.



FOR THE BOARD

⁴ Repapering this case so that the respondent could apply for cancellation of removal in removal proceedings is not an option because his drug conviction renders him ineligible for this relief as a result of section 240A(b)(1)(C) of the Act. *See generally* 65 Fed. Reg. 71273 (2000) (proposed rule).

Falls Church, Virginia 22041

File: (b) (6) – Houston, TX

Date:

JUN 28 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Lawrence E. Rushton, Esquire

APPLICATION: Reconsideration

The respondent is a native and citizen of Mexico. On February 9, 2006, the Board dismissed the respondent's appeal from the Immigration Judge's decision denying his applications for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, and a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1992). On February 10, 2016, the respondent filed with the Board a motion to reconsider based on a change of law resulting from our decision in *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). The Department of Homeland Security ("DHS") has not filed a response to the motion. The motion will be denied.

The decision in these proceedings became final on February 9, 2006, when the Board dismissed the respondent's appeal. 8 C.F.R. § 1003.1(d)(7). With certain exceptions not pertinent here, a motion to reconsider in any case previously the subject of a final decision by the Board must be filed no later than 30 days after the date of that decision (Respondent's Motion). See section 240(c)(6) of the Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b)(2). Accordingly, the respondent's motion to reconsider would have been due on or before March 13, 2006. The respondent argues that his February 10, 2016, motion to reconsider should be considered timely because his case is subject to equitable tolling (Respondent's Motion at 3-4, 7-10). Specifically, the respondent argues that, although he diligently pursued his rights, extraordinary circumstances prevented him from timely filing his motion within the statutory 30 day period (Respondent's Motion at 9-10).

Even if we assume, without deciding, that equitable tolling is available to the respondent, he has not established that equitable tolling applies under the facts and circumstances of his case. See *United States v. English*, 400 F.3d 273, 275 (5th Cir. 2005) (noting that equitable tolling turns on the facts and circumstances of a particular case and applies only in "rare and exceptional circumstances"); see also *Mata v. Lynch*, 135 S.Ct. 2150, 2155 n.3 (2015) (expressing no opinion as to whether the immigration statutes allow equitable tolling).

The respondent asserts that the basis for our February 9, 2006, decision affirming the Immigration Judge's decision denying his application for a waiver under former section 212(c) of the Act was nullified by our February 24, 2014, decision in *Matter of Abdelghany*, *supra* (Respondent's Motion at 2, 4-6). Consequently, the respondent alleges that his reliance on the

incorrect positions and interpretations of the Immigration Judge, the Board, and the Attorney General regarding his eligibility for relief under former section 212(c) of the Act prevented him from timely filing the instant motion (Respondent's Motion at 10).

However, the change of law cited by the respondent did not occur within the 30 day statutory period in which the respondent had to file his motion to reconsider. Rather, it occurred more than 7 years after the expiration of the statutory period and, as a result, does not toll the statutory period. *See Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) (observing that a party seeking reconsideration must file within 30 days of the Board's final decision, a motion which establishes that the decision should be reexamined based on, inter alia, a change of law). Moreover, the respondent has not demonstrated that the positions and interpretations of the Immigration Judge, the Board, and the Attorney General were inconsistent with binding precedent during the statutory period or otherwise argued that our decision constituted an exceptional circumstance which warrants tolling of the statutory period (Respondent's Motion). *See id.* Under these facts and circumstances, the respondent has not established that the 30 day statutory period should be tolled and his motion to reconsider is therefore denied as untimely.

The respondent, who was removed from the United States subsequent to our February 9, 2006, decision, also requests that we exercise our discretionary authority to reconsider our decision sua sponte (Respondent's Motion at 3-4, 12). *See* 8 C.F.R. § 1003.2(a). However, pursuant to 8 C.F.R. § 1003.2(d), "[a] motion to reopen . . . shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States." Thus, the respondent's removal from the United States forecloses sua sponte reconsideration. *Ovalles v. Holder*, 577 F.3d 288, 292-93 (5th Cir. 2009) (recognizing that the departure bar at 8 C.F.R. § 1003.2(d) precludes sua sponte reopening or reconsideration, even where the legal basis for removal is later determined to be erroneous); *cf. Garcia-Carias v. Holder*, 697 F.3d 257, 265 (5th Cir. 2012) (noting that "*Ovalles* resolved the issue of the applicability of the departure regulation to the Board's regulatory power to reopen or reconsider sua sponte.").

Accordingly, the following order will be entered.

ORDER: The motion to reconsider is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Houston, TX

Date:

FEB 12 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

- Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude
- Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony under section 101(a)(43)(F) of the Act
- Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] -
Convicted of crime of domestic violence, stalking, or child abuse, child
neglect, or child abandonment

APPLICATION: Remand

The respondent, a native and citizen of Mexico and lawful permanent resident of the United States, appeals from the Immigration Judge's August 25, 2015, decision ordering him removed from the United States. The respondent's request for a waiver of the appellate filing fee is granted. See 8 C.F.R. § 1003.8(a)(3). The record will be remanded.

We review findings of fact, including credibility findings and determinations as to the likelihood of future events, under the "clearly erroneous" standard. See 8 C.F.R. § 1003.1(d)(3)(i); see also *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. See 8 C.F.R. § 1003.1(d)(3)(ii).

Based on the respondent's admissions and evidence in the record regarding his criminal convictions, the Immigration Judge determined that the respondent was removable pursuant to each of the charges of removability contained in the Notice to Appear (Form I-862) (I.J. at 1-2; Exh. 1; Exh. G1; Tr. at 34-36).¹ The Immigration Judge further determined that there was no form of relief from removal available to the respondent, given his aggravated felony conviction

¹ Upon review of the Department of Homeland Security's submission of July 27, 2015, we ask the parties to consider, on remand, whether the fourth factual allegation contained in the Notice to Appear accurately names the offense of conviction (Exh. 1).

and the unavailability of a visa for purposes of adjustment of status in conjunction with a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (I.J. at 2). The Immigration Judge also found that the respondent did not express a (b) (6) Mexico, other than (b) (6) in Mexico (I.J. at 2).


On appeal, the respondent asserts that he had difficulty understanding questions that were asked during his hearing (Respondent's Brief at 3).² He also asserts that he was not provided a sufficient opportunity to apply for relief—in the form of an Application for (b) (6) to Mexico (Respondent's Brief at 3-5). He has submitted medical documentation and country conditions evidence along with his appeal brief.

We conclude that a remand is warranted for the Immigration Judge to conduct fact-finding and legal analysis regarding the charges of removability and the availability of relief from removal. While the Immigration Judge sustained the charges of removability and determined that the respondent's criminal record precluded him from relief, his decision does not include underlying findings of fact or legal analysis of the reasons why the respondent's convictions render him removable as charged or statutorily ineligible for relief (I.J. at 1-2). *See generally Matter of A-P-*, 22 I&N Dec. 468, 473 (BIA 1999) (vesting the Immigration Judge with the responsibility for ensuring the "substantive completeness of the decision"). Therefore, we are unable to meaningfully review the Immigration Judge's decision and will remand the record for further proceedings.

Given our disposition, we do not address the respondent's assertion that he was without a sufficient opportunity to seek relief or protection from removal (b) (6) to Mexico (Respondent's Brief at 3-5). We also do not address the assertions regarding his limited understanding or medical conditions, and we decline to consider the evidence submitted on appeal in the first instance. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) (stating that the Board is an appellate body whose function is to review, not create, a record). Because the record will be remanded, the respondent will have the opportunity to present any evidence in support of a claim for relief, including (b) (6) before the Immigration Judge. On remand, the Immigration Judge should address the respondent's assertions and evidentiary submissions to the extent that they relate to his ability to participate in removal proceedings (Respondent's Brief at 1-3, 6). *See generally Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) (setting forth the standards for assessing mental competency).

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

² The respondent's appeal brief is not paginated. For ease of reference, we consider the title page of the brief, with the case caption, to be page 1.

Falls Church, Virginia 22041

File: (b) (6) 046 – New York, NY

Date:

MAY 18 2016

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Perham Makabi, Esquire

APPLICATION: Reopening

On February 26, 2016, the respondent filed a motion to reopen seeking an opportunity to reapply for (b) (6), and to apply for (b) (6). The Department of Homeland Security has not filed a response. The motion will be denied.

The respondent's motion is untimely by more than 14 years. 8 C.F.R. § 1003.2(c)(2); March 12, 2001, Board dec. (final administrative decision dismissing the respondent's appeal from the Immigration Judge's denial of his applications for (b) (6) to Croatia, and suspension deportation). Moreover, he does not argue that the late filing of his motion is excused, including pursuant to the (b) (6). See Motion to Reopen (Motion) at 1-7. (b) (6)

The respondent specifically requests sua sponte reopening for (b) (6) consideration. See Motion at 1, 3. However, he has not demonstrated exceptional circumstances warranting such action. (b) (6) (BIA 1997); (b) (6) (BIA 1999).

Insofar as the respondent contends that there has been a (b) (6) since his last hearing affecting his eligibility for the relief he now seeks (given the decision in *Islami v. Gonzales*, 412 F.3d 391 (2d Cir. 2005)), we disagree. Motion at 1, 5-6, 7.

In *Islami*, the United States Court of Appeals for the Second Circuit concluded that on the particular facts presented therein, the alien had (b) (6). . .". *Id.* at 397. The Second Circuit cited (b) (6) (4th Cir. 1990) as support for this conclusion. *Id.*

In turn, we note that (b) (6) is the case in which the United States Court of Appeals for the Fourth Circuit affirmed our own longstanding decision in (b) (6) (BIA 1987) (holding, in part, that (b) (6) be established where the alien, as a result of (b) (6), would necessarily be required to (b) (6); also citing pertinent parts of the Office of the United Nations High Commissioner for (b) (6) *Handbook on Procedures and*

(b) (6)

Criteria for (b) (6) Under the (b) (6) and the 1967 Protocol Relating to the Status of (b) (6) (Geneva 1979).¹ Thus, we are not persuaded that the decision in *Islami* amounts to a (b) (6) for purposes of whether reopening is warranted on our own motion.

Even if *Islami* were viewed as constituting a (b) (6), we note that *Islami* was decided in June 2005, more than a decade *before* the filing of the instant motion. No explanation has been provided for the prolonged delay in filing the respondent's motion to reopen based on *Islami* and related arguments.

Accordingly, the respondent's untimely motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

¹ Our decision in *Matter of A-G-*, *supra*, was published 17 years before the Second Circuit issued its decision in *Islami v. Gonzales*, *supra*.

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 08 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Robert E. Dunn, Esquire

ON BEHALF OF DHS: Saida Ulee
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Motion to remand; (b) (6)

This case was last before the Board on December 9, 2011, when we dismissed the respondent's appeal of the Immigration Judge's March 18, 2010, decision finding him ineligible for (b) (6) under sections (b) (6) of the Immigration and Nationality Act, (b) (6), and denying his application for (b) (6), on the merits.¹ This case is now before us pursuant to a remand from the United States Court of Appeals for the Ninth Circuit, where it arises, dated (b) (6) 2015. During the pendency of this remand, the respondent filed a motion to remand. The Department of Homeland Security ("DHS") opposes the motion. The motion will be granted, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

In its order, the Ninth Circuit concluded that the Board erred in finding the respondent's 1990 conviction for voluntary manslaughter in violation of California Penal Code section 192(a), for which he was sentenced to 11 years' imprisonment, to be a categorical crime of violence and aggravated felony as defined by section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). As such, the Ninth Circuit found the Board and the Immigration Judge erred in finding the

¹ The Immigration Judge also denied the respondent's applications for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), in conjunction with a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). These applications are not at issue in this decision nor is the issue of eligibility under former section 212(c) of the Act.

respondent ineligible for (b) (6) under the Act and (b) (6) based on a *per se* particularly serious crime. In addition, the Ninth Circuit concluded that the Board erred in affirming the Immigration Judge's denial of (b) (6) on the merits because we did not consider "all evidence relevant to the (b) (6)." See (b) (6) (9th Cir. Sept. 1, 2015) (unpublished).

Through his motion, the respondent argues that a remand is necessary because the Immigration Judge never considered his application for (b) (6) under the Act on the merits. In its opposition, the DHS contends that a remand is not necessary because the respondent's offense remains a particularly serious crime even though the Ninth Circuit has found it not to be a categorical crime of violence and therefore a *per se* crime of violence. According to the DHS, the Board has all of the necessary information to do an independent analysis of the respondent's offense and find it to be particularly serious rendering him ineligible for relief under the Act.

We find that a remand is necessary for the Immigration Judge to consider in the first instance whether the respondent's offense is a particularly serious crime notwithstanding that the Ninth Circuit has deemed it not to be an aggravated felony and *per se* particularly serious. See *Blandino-Medina v. Holder*, 712 F.3d 1338, 1345 (9th Cir. 2013) (the *per se* particularly serious crime bar for certain aggravated felonies does not preclude the Attorney General from finding that an alien has been convicted of a particularly serious crime); see also *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). In this regard, the Board articulated the standards for determining whether an alien has committed a particularly serious crime in our decision in *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). See *id.* (we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community); see also *Konou v. Holder*, 750 F.3d 1120, 1126-28 (9th Cir. 2013).

Upon remand, the Immigration Judge should apply the standard set forth in *Matter of Frentescu* in determining whether the respondent's offense is particularly serious rendering him ineligible for relief under the Act. Should the Immigration Judge find the respondent eligible for (b) (6) under the Act, she should consider the merits of that application in the first instance. The parties should also be permitted to submit additional evidence pertaining to all of the respondent's applications, including for (b) (6), and the Immigration Judge should issue a new decision on all applications.

Accordingly, the following order will be entered.

ORDER: The respondent's motion to remand is granted, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) – Cleveland, OH

Date:

In re: (b) (6)

JAN - 6 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Matthew Lytle Benson, Esquire

ON BEHALF OF DHS: Jeremy Santoro
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

In a decision entered on January 12, 2015, the Board dismissed the respondent's appeal from the decision of the Immigration Judge. The respondent filed a timely motion to reopen his proceedings, which the Department of Homeland Security (DHS) has opposed. The respondent filed a supplement to the motion on December 16, 2015.

With his supplement the respondent has provided evidence showing that he married a United States citizen on (b) (6), 2015, and that she has filed an immediate relative visa petition on his behalf. The respondent's filing includes evidence that he and his wife have a daughter who was born on (b) (6) 2009. There is no evidence before us indicating that he is barred from adjusting his status, and the DHS has not opposed reopening on this basis.

Considering the entirety of circumstances presented, the motion to reopen is granted and the record will be remanded to the Immigration Judge to allow the respondent an opportunity to pursue an application for adjustment of status. *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with this order and entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: FEB 22 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Derek Asiedu-Akrofi, Esquire

APPLICATION: Reopening; stay or removal

The Board issued a final administrative decision in this case on October 21, 2014. On December 10, 2015, the respondent, a native and citizen of Honduras, filed the instant motion to reopen, with an accompanying request for a stay of removal. The Department of Homeland Security (“DHS”) has not submitted a response to the motion. The motion will be denied.

In support of reopening, the respondent asserts, for the first time in these proceedings, that she is (b) (6). She asserts that her husband recently (b) (6) and has (b) (6) in Honduras. On that basis, the respondent (b) (6). The evidence proffered in support of her motion is a personal declaration, a (b) (6) (Application for (b) (6) and for (b) (6)), a 2014 State Department Country Report on Human Rights Practices for Honduras, and other internet articles.

The instant motion is untimely because it was not filed within 90 days of our October 21, 2014, final administrative decision. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). We acknowledge that there is an exception to the time limitation on motions to reopen to apply for (b) (6) based on “(b) (6) in the country of nationality . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.” (b) (6) (9th Cir. 2008) (stating that in order to prevail on a motion to reopen based on (b) (6) (a) an alien must present evidence of (b) (6) in the country in question, (b) the evidence must be material and previously unavailable, and (c) the evidence, in conjunction with the evidence of record, establishes that the alien is prima facie eligible for the requested relief). Untimely motions to reopen that rely solely on (b) (6) are not sufficient, but an untimely motion to reopen based on evidence of (b) (6) that are relevant in light of an alien’s (b) (6) may be sufficient. See *Chandra v. Holder*, 751 F.3d 1034, 1037 (9th Cir. 2014).

Here, we conclude that the respondent has only shown (b) (6), i.e., that her (b) (6) in Honduras. The evidence proffered with the motion does not show that (b) (6) in Honduras have (b) (6), between the respondent’s previous hearing in May 2013 and

(b) (6)

the filing of her current motion to reopen. See 8 C.F.R. § 1003.2(c)(3)(ii); *Chandra v. Holder*, *supra*, at 1039.

Moreover, the respondent has not proffered sufficient evidence with this motion to make a prima facie showing that she is eligible for the relief she seeks at this time. The fact that her family's (b) (6)

(b) (6) is insufficient to show that her family (b) (6) upon her repatriation. See (b) (6) (9th Cir. 1996) (holding that (b) (6) does not equal (b) (6)). Moreover, mere (b) (6)

(b) (6) is, without more, insufficient to make a prima facie showing that she may face (b) (6) upon her repatriation, inasmuch as there is no evidence that the Honduran (b) (6)

(b) (6). The evidence is also insufficient to make a prima facie showing that the respondent (b) (6)

(b) (6) upon her repatriation to Honduras. See (b) (6).

Based on the foregoing, the respondent has not shown a (b) (6) that would exempt her from the general time limitation on motions to reopen. We therefore deny the instant motion to reopen as untimely. We also do not find exceptional circumstances that would warrant reopening pursuant to our own discretionary *sua sponte* authority under 8 C.F.R. § 1003.2(a). See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of removal is denied as moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

MAY 25 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

The Board issued a final administrative decision in this case on October 24, 2011, denying the respondent's application for (b) (6). On December 1, 2015, the respondent, a native and citizen of the People's Republic of China, filed the instant motion to reopen. The Department of Homeland Security ("DHS") has not submitted a response to the motion. The motion will be denied.

The respondent asserts that reopening is warranted because he (b) (6) in the United States. He alleges that (b) (6). The respondent asserts that as a result of his (b) (6), the (b) (6) (Motion to Reopen at 2). In support of his motion, the respondent has submitted, *inter alia*, a sworn statement, a new (b) (6) application, a letter from his spouse in China, photographs purporting to depict (b) (6), and various internet articles pertaining to (b) (6) in China.

The instant motion is untimely because it was not filed within 90 days of our October 24, 2011, final administrative decision. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is an exception to the time limitation on motions to reopen to apply for (b) (6) in the country of nationality . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing." (b) (6) (9th Cir. 2008) (stating that to prevail on a motion to reopen based on (b) (6) (a) an alien must present evidence (b) (6) in the country in question, (b) the evidence must be material and previously unavailable, and (c) the evidence, in conjunction with the evidence of record, establishes that the alien is *prima facie* eligible for the requested relief). Untimely motions to reopen that rely solely on (b) (6) are not sufficient, but an untimely motion to reopen based on evidence of (b) (6) that are relevant in light of an alien's (b) (6) may be sufficient. *See* (b) (6) (9th Cir. 2014).

Here, the respondent's recent (b) (6) the United States, standing alone, constitute (b) (6) in China, such that his motion may be found to fall within the exception to the general time limitation for motions to reopen. See (b) (6).

Further, the respondent has not established that since his last hearing before the Immigration Judge in December 2009, there has been a (b) (6) in China (b) (6), or who are otherwise (b) (6). See (b) (6) (BIA 2007), *aff'd*, (b) (6) (2nd Cir. 2008) (stating that, in determining whether evidence accompanying a motion to reopen demonstrates a (b) (6) that would justify reopening, we compare the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below). The respondent has not submitted any direct evidence of (b) (6) and (b) (6) at the time of his hearing in December 2009, and no such evidence exists in the administrative record.

Additionally, the respondent has not proffered sufficient evidence with this motion to make a prima facie showing that he is eligible for the relief he seeks at this time. We do not find the respondent's affidavit or the letter from his spouse sufficiently persuasive to warrant untimely reopening because it does not prima facie show that (b) (6) (Motion to Reopen, Exh. 6). The spouse's vague statement (b) (6) that if she did (b) (6) would be hard to imagine," does not suffice (*Id.*).

Furthermore, we are also unpersuaded that the proffered evidence makes a prima facie showing of a (b) (6) in the United States. (b) (6) (9th Cir. 2009) (discussing the standards for making a (b) (6), and collecting and comparing cases). In sum, the experiences of (b) (6) in China are insufficient to prima facie demonstrate that the respondent himself may (b) (6) upon his repatriation, such that reopening for further proceedings on his claim would be warranted.

Based on the foregoing, the respondent has not shown (b) (6) from the general time limitation on motions to reopen. We therefore deny the instant motion to reopen as untimely. We also do not find (b) (6) that would warrant reopening pursuant to our own discretionary *sua sponte* authority under (b) (6). See (b) (6) (BIA 1997). Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date:

NOV - 6 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Brian M. Doyle, Esquire

ON BEHALF OF DHS: Patrick T. Cullinan
Assistant Chief Counsel

APPLICATION: Reopening

On June 26, 2015, the Board dismissed the respondent's appeal from the Immigration Judge's May 19, 2014, decision. On August 14, 2015, the respondent filed the instant timely motion to reopen to enable him to apply for adjustment of status as the husband of a United States citizen.¹ See section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The respondent has offered evidence that he divorced his former wife on (b) (6) 2014, and married his current wife on (b) (6) 2015. He has also offered evidence that he is the beneficiary of a pending visa petition (Form I-130) filed by his current wife on July 31, 2015. The Department of Homeland Security ("DHS") opposes reopening. The motion will be granted and the record will be remanded to the Immigration Judge.

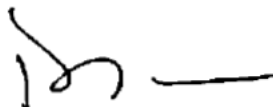
A properly filed motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the alien's behalf, where, inter alia, clear and convincing evidence is presented indicating a strong likelihood that the marriage is bona fide. See *Matter of Velarde-Pacheco*, 23 I&N Dec. 253, 256 (BIA 2002), overruled in part by *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009) (overruling *Matter of Velarde-Pacheco* to the extent it held that a motion to reopen may be denied solely on DHS opposition).

¹ The respondent's grant of voluntary departure automatically terminated upon the filing of this motion, and the penalties for failure to depart under section 240B(d) of the Act, 8 U.S.C. § 1229c(d), will not apply. See also 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1).

With the motion, the respondent has offered copies of photographs of his wedding; a bank statement indicating that the respondent and his wife opened a joint account on (b) (6), 2015; a letter from the respondent's current mother-in-law who states her belief that the respondent and his current wife started seeing each other in (b) (6) 2014, and that they love each other; and a letter from the respondent's step-grandfather indicating that after the respondent decided to marry his current wife, he began renting a room in the step-grandfather's house, and that he has been an excellent tenant.

Upon consideration, we find that the motion and supporting documents are sufficient to grant this timely motion. On remand, the parties will have the opportunity to address the respondent's eligibility for adjustment of status and whether he is deserving of the relief in the exercise of discretion. Accordingly, the following order will be entered.

ORDER: The motion to reopen is granted and the record is remanded to the Immigration Judge for further proceedings consistent with this decision.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: MAR - 7 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Marvin M. Gong, Esquire

The respondent is a native and citizen of Mexico. He filed an untimely motion to reopen on January 14, 2016, over 11 years after we dismissed his appeal without opinion on May 12, 2004. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). The motion to reopen, to which the Department of Homeland Security (DHS) has not responded, will be denied.

The respondent seeks to have his case reopened and then administratively closed, based on a March 6, 2015, grant of Deferred Action for Childhood Arrivals (DACA) by the DHS, U.S. Citizenship and Immigration Services. However, his desire to administratively close the proceedings for this reason does not provide a basis for him to file an otherwise untimely motion to reopen, or warrant sua sponte reopening. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

The decision to confer DACA benefits upon the respondent is simply the result of the DHS' policy to give low priority to the enforcement of the immigration laws in certain cases. *See Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982). By being granted DACA benefits, the respondent has not become prima facie eligible for any form of relief from removal which can be granted by an Immigration Judge or this Board. *See Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) ("As a practical matter, Immigration Judges and the Board have limited and finite adjudicative and administrative resources, and those resources are best allocated to matters over which we do have jurisdiction."). The fact that the respondent wishes to travel to Mexico to visit his sick grandmother, and is displeased with actions taken by attorneys in the past, does not cause us to administratively close these proceedings based on the grant of DACA benefits.¹

¹ While the respondent claims that he was a victim of ineffective assistance of counsel, he shows no prejudice resulting from the actions of prior counsel. The respondent was found not eligible for cancellation of removal for certain nonpermanent residents, under section 240A(b)(1) of the Act, as he had no qualifying relative necessary for a grant of relief. Section 240A(b)(1)(D) of the Act; I.J.'s Feb. 12, 2003, dec. Further, any request for a favorable exercise of prosecutorial discretion or a request for advance parole would have to be pursued before the DHS.

In light of the receipt of DACA benefits, it does not appear that the DHS intends to remove the respondent from the United States at the present time. However, as the respondent's motion to reopen was untimely filed, and as he does not establish that sua sponte reopening is warranted, the pending motion will be denied.

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Oklahoma City, OK

Date: MAY - 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Armin A. Skalmowski, Esquire

APPLICATION: Reopening

On February 14, 2012, the Board dismissed the respondent's appeal from the Immigration Judge's September 14, 2009, decision denying his application for (b) (6). This case was last before the Board on June 27, 2012, when we denied the respondent's motion to reconsider.¹ On January 27, 2016, the respondent, a native and citizen of China, filed the instant motion to enable him to apply for cancellation of removal, and to reapply for (b) (6) and related relief. The motion is untimely and will be denied. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(1); 8 C.F.R. § 1003.2(c)(2).

The respondent seeks to toll the filing deadline based on a claim of ineffective assistance of counsel against his former attorney who represented him before the Immigration Judge and the Board. The respondent claims that the attorney failed to discover that he entered the United States in (b) (6) 1997, and incorrectly pled to the allegation that he entered in (b) (6) 2002. The respondent, against whom these proceedings were initiated on February 13, 2008, thus claims that he was precluded from applying for cancellation of removal due to his attorney's handling of this case. See sections 240A(b)(1)(A), (d)(1)(A) of the Act, 8 U.S.C. §§ 1229b(b)(1)(A), (d)(1)(A).

In general, an alien may file only one motion to reopen which must be filed within 90 days of the final administrative decision. See 8 C.F.R. § 1003.2(c)(2). The time limitation on a motion to reopen may be equitably tolled based on a claim of ineffective assistance of counsel. See *Riley v. I.N.S.*, 310 F.3d 1253, 1258 (10th Cir. 2002). To succeed on a claim of ineffective assistance of counsel, an alien must comply with the procedural requirements for an ineffective assistance of counsel claim before the Board as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). See *Tang v. Ashcroft*, 354 F.3d 1192, 1196-97 (10th Cir. 2003). Beyond a showing of ineffective assistance, an alien must show that he exercised due diligence in pursuing the case during the period he seeks to toll. See *Mahamat v. Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005). The alien must also show that he was prejudiced by counsel's ineffective assistance. See *Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008); *Matter of Lozada*, *supra*, at 638.

¹ The respondent's petition for judicial review of the Board's decision was dismissed for lack of prosecution. *Ni v. Holder*, No. 13-9563 (10th Cir. 2013).

Assuming that the respondent has complied with the procedural requirements set forth in *Matter of Lozada, supra*, he has not shown that he exercised due diligence in bringing his ineffective assistance of counsel claim before the Board. The respondent's motion was filed more than 3 years after the filing deadline. Nevertheless, the respondent has not shown when he learned of the alleged ineffective assistance of counsel, or otherwise explained the delay in bringing this motion before the Board. Further, we are not persuaded that the respondent suffered prejudice as a result of his former attorney's actions. Despite the respondent's allegations, we note that he testified under oath and through an interpreter that he left China in 2001 and arrived in the United States in 2002. *See* Transcript of the Proceedings at 13, 18-19, 52, 90-91. Therefore, equitable tolling of the filing deadline based on the respondent's ineffective assistance of counsel claim is not warranted in this case.

The respondent, who claims to be Christian, also seeks reopening for (b) (6) in China. The respondent, who is from Fujian Province, argues that since his removal hearing, (b) (6). In a statement (Motion Tab A) offered in support of the motion, the respondent's mother-in-law in (b) (6), Fujian Province, states that after the (b) (6) in 2013, she asked the respondent and his wife to send (b) (6). She further states that on (b) (6) 2015, the (b) (6). The (b) (6) and (b) (6) of the respondent and his wife, and (b) (6) upon his return to China. In support of his claim, the respondent has offered U.S. Department of State reports on (b) (6) in China in 2014, as well as media articles pertaining to (b) (6) in China.² *See* Motion Tab B.

The filing deadline imposed on motions to reopen does not apply to motions to reopen to reapply for (b) (6) arising in the alien's country of nationality or the country to which the alien's removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* section (b) (6) of the Act; (b) (6). The alien, however, bears the "heavy burden" to show that the proffered evidence is material, reflects (b) (6) arising in the country of nationality, and supports a prima facie case for a grant of (b) (6). (b) (6) (BIA 2007).

At the time of the removal hearing, and at present, the (b) (6) of

² The respondent has resubmitted the 2008 U.S. Department of State report on (b) (6) in China in 2008 which was also included in the record before the Immigration Judge. *See* Motion Tab B.

(b) (6)

(b) (6)

. Motion Tab B at 28-29, 31-32, 36 43-45. We note that at his removal hearing, the respondent testified that in (b) (6) 2007, (b) (6) that the respondent had mailed to China. See Transcript of the Proceedings at 64. The new evidence shows that in 2011, the Chinese (b) (6) in recent years. *Id.*, at 23, 32, 45. Nevertheless, the (b) (6). *Id.*, at 26, 29, 43, 79, 82, 85.

The (b) (6) are consistent with the (b) (6) prior to and after the respondent's removal hearing. The new evidence does not show, however, that conditions in Fujian Province have (b) (6) since the Immigration Judge's decision to warrant reopening to enable the respondent to apply for (b) (6), whether under the Act (b) (6). See (b) (6) ("[i]n determining whether evidence accompanying a motion to reopen demonstrates a (b) (6) that would justify reopening, we compare the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below").

In sum, it has not been shown that equitable tolling of the filing deadline or reopening based on a claim of (b) (6) is warranted in this case. Further, it does not appear that any exception to the filing deadline applies to this motion or that an exceptional situation is present in this case to warrant the exercise of the Board's limited sua sponte authority. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"); 8 C.F.R. §§ 1003.2(a), (c)(3). Accordingly, the respondent's untimely motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Dallas, TX

Date:

MAY 26 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Olusegun Asekun, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section
212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of a material fact

APPLICATION: Removal; reopening

This case comes to us on remand from the United States Court of Appeals for the Fifth Circuit. The case was last before the Board on June 23, 2015, when we affirmed the Immigration Judge's determination that the respondent was removable as charged. On (b) (6), 2015, the Fifth Circuit granted the government's unopposed motion to remand the record to the Board "to clarify whether the respondent rebutted the presumption that he gained his lawful permanent residency status because of his misrepresentation, by demonstrating that no proper determination of inadmissibility could have been made."

On September 22, 2015, the respondent filed a motion to reopen with the Board. Thus, the motion was pending when the Fifth Circuit granted the government's motion to remand. The respondent asserted in the motion that reopening is warranted due to (b) (6) that may affect his eligibility for relief. Specifically, on June 24, 2014, during the pendency of the respondent's appeal of the Immigration Judge's removability determination, the respondent remarried his United States citizen wife, who had divorced him on (b) (6), 2008. The respondent further asserted that he may be eligible for a waiver of inadmissibility under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H) (Motion at 1).

We first address the circuit court's remand. The charge of deportation was based on the allegation that the respondent misrepresented a material fact in connection with his Form I-485 (Application to Register Permanent Residence or Adjust Status), *i.e.*, the status of his marital union (Exh. 1). The Immigration Judge sustained the charge based on (a) the respondent's testimony; (b) the information contained in the respondent's Form I-485; and (c) an adverse credibility finding (I.J. dated April 13, 2013, at 3-5).

During his testimony, the respondent admitted that at his adjustment of status interview he did not reveal that he was living in Dallas instead of with his wife in her home in (b) (6).

The Immigration Judge found that the omission was material. Specifically, the Immigration Judge stated—

Given that there were indicia of possible marriage fraud or other ineligibility, the government may well have conducted a further investigation at that time if it had known that the Respondent was living primarily at an address far from where the petitioner resided. In short, because of the Respondent's omission concerning his true place of residence, the government approved the I-485 based on the mistaken belief that petitioner and Respondent were still living together as a married couple in (b) (6) Texas from the time of Respondent's admission to the United States until the date of his adjustment interview.

(I.J. dated April 13, 2013, at 4-5). Thus, the Immigration Judge found that the omission tended to cut off a line of inquiry that may have resulted in a finding that the respondent's marriage was not bona fide (I.J. dated April 13, 2013, at 5).

On his Form I-485, the respondent also did not reveal his Dallas address. The Immigration Judge found that the respondent confirmed to the interviewer that he was living at the (b) (6) address (I.J. dated April 13, 2013, at 5).

The Immigration Judge found the respondent to be not credible because he did not reveal his Dallas address during the adjustment interview or on his Form I-485, and the Immigration Judge did not credit the respondent's explanation that he did not reveal the Dallas address because he considered Dallas where he worked and not where he lived (I.J. dated April 13, 2015, at 4). Additionally, the Immigration Judge found that the respondent was not credible in his testimony that he moved from the (b) (6) address to Dallas 8 months after he arrived in the United States because the testimony conflicted with the respondent's wife's sworn statement that the respondent moved to Dallas 3 months after he arrived, and the respondent did not provide evidence to corroborate his testimony. The testimony also conflicted with the divorce decree, which reflected (b) (6) 2003 separation date. The Immigration Judge further found that the respondent's demeanor and hesitancy indicated a lack of confidence in his answers (I.J. dated April 13, 2015, at 4-5).

The Immigration Judge considered the wife's September 22, 2010, sworn statement and (b) (6), 2008, letter, which indicate that the respondent left her in (b) (6) 2003, and state the wife's belief that the respondent married her to get a green card and citizenship. The Immigration Judge, however, gave little weight to either piece of evidence because the wife did not present herself for cross-examination, and because there was reliable record evidence showing that she visited the respondent's family when she traveled to Nigeria in 2005 and 2010 (I.J. dated April 13, 2015, at 4).

Upon further review of the record and our June 23, 2015, decision, we conclude that a remand is warranted for further fact finding and analysis on the issue of the respondent's removability.

Pursuant to the Supreme Court's decision in *Kungys v. United States*, 485 U.S. 759 (1988), to find that the respondent's misrepresentation regarding the status of his marriage was material, the record must demonstrate by clear, unequivocal, and convincing evidence that the misrepresentation either resulted in the erroneous grant of a benefit, or that it had a "natural tendency" to affect the decision to grant the benefit. *Id.* at 771. The Board has considered this second aspect in terms of the tendency of the misrepresentation to shut off a line of inquiry which might well have resulted in a proper determination that the respondent be excluded. *See Matter of Bosuego*, 17 I&N Dec. 125 (BIA 1979; 1980); *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; A.G. 1961). *See also Matter of D-R-*, 25 I&N Dec. 445, 450 (BIA 2011) ("The test for whether 'concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service.'). Once the DHS has made this showing, the burden shifts to the respondent to demonstrate that, nevertheless, no proper finding of inadmissibility could be made. *Matter of Bosuego, supra*; *see also Kungys v. United States, supra*. It is not sufficient for the DHS to show simply that a line of questioning was foreclosed; DHS must also produce sufficient evidence to "raise a fair inference that a statutory disqualifying fact actually existed." *Kungys v. United States, supra*, at 783 (concurring).

As stated, the Immigration Judge determined that the respondent's misrepresentation of where he lived at the time of his adjustment of status interview was material. We affirmed this determination because we agreed with the Immigration Judge that the misrepresentation was capable of affecting or influencing the USCIS's decision to grant adjustment of status based on the respondent's marriage to a United States citizen (BIA dated June 23, 2015, at 4). We continue to agree with this determination.

However, we overlooked in our prior decision that the Immigration Judge did not shift the burden of proof to the respondent upon the DHS's showing of materiality of the misrepresentation. *See Matter of Bosuego, supra*. The respondent was not given an opportunity to show that, notwithstanding materiality, no proper finding of inadmissibility could be made (Respondent's Br. at 9). Hence, we will remand the record for further fact finding and analysis.

For purposes of determining on remand whether the respondent can demonstrate that no proper finding of inadmissibility could be made, we note that the Immigration Judge discounted the weight of the respondent's wife's sworn statement and letter, and the wife did not testify at the respondent's hearing (I.J dated April 13, 2013, at 3; Respondent's Br. at 10, 11).¹ The other evidence on which the Immigration Judge relied to find that there were "indicia of possible marriage fraud" was the Form I-213 (Record of Deportable/Inadmissible Alien), which reflects

¹ The respondent recounts on appeal the DHS's closing statement that it did not present the respondent's wife as a witness because her sworn statement and letter were inconsistent with her actions of traveling to Nigeria twice after the 2003 separation, including to receive a chieftaincy title in honor of her marriage to the respondent. The DHS stated that it did not think that the wife could "support [DHS's] contention that the respondent entered knowingly into a non-bona fide marriage" (Respondent's Br. at 10, 11; Tr. at 100).

that the USCIS issued two Notices of Intent to Deny ("NOID") before it approved the respondent's wife's Form I-130 (I.J. dated April 13, 2015, at 3 n.1; Exh. 3, Tab B at 3). Neither NOID is in the record. Hence, there is no record evidence that the USCIS issued the NOIDs based on a marriage fraud concern. The Immigration Judge speculated that the NOIDs were indicia of marriage fraud. Accordingly, the record contains limited evidence that the respondent's marriage was fraudulent.

Additionally, we have explained that absent evidence that a marriage was a sham in its inception or entered into for the purpose of evading the immigration laws, a spousal visa petition cannot be denied merely because the parties were separated or no longer together. Separation is only a relevant factor in ascertaining a couple's intent at the time of the marriage. *Matter of Adalatkhah*, 17 I&N Dec. 404 (BIA 1980); *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980). Thus, the respondent's admission that he did not reveal that he was living separately from his wife at the time of his adjustment interview did not necessarily indicate that the marriage was fraudulent at its inception. We also note that the Immigration Judge did not consider the intent of the respondent and his wife at the start of their marriage (Respondent's Br. at 8, 9-10).

On remand, the respondent should have the opportunity to supplement the record with documentary and testimonial evidence to show that no proper finding of inadmissibility could be made. We note that the record does not contain any documentation pertaining to the respondent's adjustment of status interview, which should be provided given its relevance to the issue of whether the respondent can rebut the materiality issue (Respondent's Br. at 8-9).

Given our decision to remand the record, the respondent's motion to reopen is moot. On remand, however, the respondent also should have the opportunity to apply for any relief for which he currently is eligible, including any relief based on his remarriage to his United States citizen wife.

Accordingly, the following orders will be entered.

ORDER: The record is remanded for further proceedings consistent with this opinion and for the entry of a new decision.

FURTHER ORDER: The motion to reopen is moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Newark, New Jersey

Date:

In re: (b) (6)

OCT 27 2015

IN REMOVAL PROCEEDINGS

MOTION

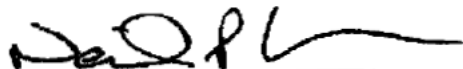
ON BEHALF OF RESPONDENT: Tenzin Wangyal, Esquire

APPLICATION: Reopening

The proceedings in this matter were last before the Board on December 17, 2009. By that decision, the Board affirmed the decision of the Immigration Judge denying the respondent's application for (b) (6) on the basis that the respondent, (b) (6), failed to meet the burden of proof to establish (b) (6) by the Act. On August 24, 2015, the respondent filed a motion to reopen proceedings. The Department of Homeland Security has not responded to the motion.

The respondent's motion to reopen is untimely filed, but she urges that the motion should be found to fall within the exception to the time limits for motions to reopen to reapply for (b) (6) "arising in the country of nationality." See section (b) (6) of the Immigration and Nationality Act, (b) (6). The respondent has proffered evidence of (b) (6) in China (b) (6) since this case was last before the Immigration Judge on March 12, 2009. We make no comment on the ultimate outcome of this case, but find that the respondent has presented sufficient evidence of recent (b) (6) in China to warrant reopening. *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). On remand, the parties may present new evidence and testimony as desired and the reliability of the evidence presented may be addressed if necessary. Accordingly, the unopposed motion to reopen will be granted, and the record will be remanded for a new hearing.

ORDER: The motion to reopen is granted, and the record is remanded to the Immigration Court for further proceedings not inconsistent with the foregoing opinion, and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

MAR 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raymond Lo, Esquire

APPLICATION: Reconsideration; reopening

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated September 29, 2015, which denied his motion to reopen proceedings. He also moves to reopen proceedings to reapply for (b) (6) and to apply for (b) (6). The record before us does not contain a response from the Department of Homeland Security (“DHS”). The motions will be denied.

The respondent’s motion to reopen filed on December 28, 2015, is untimely and number barred.¹ He does not satisfy any statutory or regulatory exception to the time and numerical limitations on his motion to reopen. Sections 240(c)(7)(A) and (C) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) and (C); 8 C.F.R. §§ 1003.2(c)(2) and (3). He does not present an exceptional situation which would warrant sua sponte reopening. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). His motion does not state any “new facts” and is not supported by affidavits or other evidentiary material, as required by section 240(c)(7)(B) of the Act and 8 C.F.R. § 1003.2(c)(1).

The respondent’s motion to reconsider is untimely. He does not present an exceptional situation which would warrant sua sponte reconsideration. *Matter of J-J-*, *supra*. He asserts that the Board erred in making its decision without considering *Mei Qin Zheng v. Holder*, 538 Fed. Appx. 51 (2d Cir. Sept. 19, 2013). He filed his first motion to reopen in June of 2015. He could have discussed *Mei Qin Zheng v. Holder*, *supra*, in that motion. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). In addition, rulings by summary order of the United States Court of Appeals for the Second Circuit do not have precedential effect. The Second Circuit’s Local Rule 32.1.1 [disposition by summary order].

The respondent asserts that the Board erred in giving little weight to his uncle’s letter because it was not notarized. However, we also gave the letter little weight because it was authored by an interested party not subject to cross-examination. The respondent asserts that it

¹ The final administrative decision in this case is our July 10, 2003, decision which dismissed the respondent’s appeal from the Immigration Judge’s September 20, 2002, decision which found him removable and denied his (b) (6) application.

(b) (6)

was unreasonable to expect him to have the summons authenticated. However, we also gave the summons little weight because it was unsigned. We observed that the summons was not authenticated according to the regulations *or by any other means*.

Further, *Mei Qin Zheng v. Holder, supra*, is distinguishable from the present case. The respondent asserts that the Board erred in stating that he did not show (b) (6) for them. He points out that in *Mei Qin Zheng v. Holder, supra*, at 54, the court referred to the 2008 Annual Report of the Congressional-Executive Commission on China and the Bureau of Democracy, Human Rights, and Labor ("BDHRL"), U.S. Dep't of State ("DOS"), *China - Profile of* (b) (6) (May 2007). Neither of these documents is in the record of proceeding.

The BDHRL, DOS, *China Country Reports on Human Rights Practices - 2013* (Feb. 2014) [Exh. F to first Motion to Reopen filed in June of 2015] at 10-11 state that the (b) (6), but that these measures were not universally effective. See (b) (6) (2d Cir. 2005) (in the absence of solid support in the record, an applicant's (b) (6) is speculative at best); (b) (6) (2d Cir. 2013) [decided Dec. 18, 2013] (referring to another case where the alien argued that the Chinese (b) (6), and the court found that claim was speculative).

Finally, the respondent asserts that the DHS did not respond to his first motion to reopen filed in June of 2015, and the motion should have been deemed unopposed. We observed in our September 29, 2015, decision that the record of proceeding did not contain a DHS response. However, the fact that a motion is unopposed, while taken into consideration, does not mean that we cannot deny the motion. We conclude that the respondent does not present an exceptional situation to warrant sua sponte reconsideration. *Matter of J-J, supra*.

Accordingly, the following orders will be entered.

ORDER: The motion to reconsider is denied as untimely.

FURTHER ORDER: The motion to reopen is denied as untimely and number barred.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Atlanta, GA

Date: MAY 20 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sophia Solovyova, Esquire

APPLICATION: Reopening

This matter was last before the Board on January 13, 2015, when we dismissed the respondent's appeal. On April 13, 2015, the respondent filed a timely motion to reopen alleging ineffective assistance of counsel and seeking to reapply for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) in conjunction with a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i). The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be granted and the record will be remanded.

Applicable regulations provide that a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted." 8 C.F.R. § 1003.2(c)(1). Moreover, a movant must satisfy the "heavy burden" of establishing that if the proceedings were reopened, with all the attendant delays, the new evidence would likely change the result in the case. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

To establish a due process violation, the petitioner must show that she was deprived of liberty without due process of law and that the purported errors caused her substantial prejudice. *See Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1275 (11th Cir. 2009). To prevail on an ineffective assistance of counsel claim, an alien must show that competent counsel would have acted otherwise and that the alien was prejudiced. *See Ali v. U.S. Att'y Gen.*, 643 F.3d 1324, 1329 (11th Cir. 2011) (alien must establish prejudice in order to prevail on ineffective assistance claim); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003).

The respondent is a native and citizen of Albania. She appeared at a master calendar hearing on October 11, 2002, in Detroit, Michigan, and pled to the allegations in the Notice to Appear ("NTA"), amending "unknown date" and "unknown POE" with "on May 2, 2001, at New York City" (Exh. 1; Tr. at 2-3).¹ The respondent also conceded the charge of removability under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A) (Tr. at 3). At that time, the respondent

¹ The DHS did not contest the Immigration Judge amending the NTA with "May 2, 2001, at New York City" (Tr. at 3).

indicated that she would be (b) (6) (Tr. at 3-4). The respondent subsequently moved to change venue to New York, NY, which was granted.

On October 1, 2005, the respondent married a United States citizen who filed an immediate relative visa petition on the respondent's behalf which was approved on October 18, 2006 (I.J. Written Decision dated October 1, 2012, at 4). The respondent then moved to change venue again, this time to Atlanta, Georgia, where she now resided with her husband (Tr. at 8-9). This motion was granted and on August 18, 2009, the respondent appeared at a master calendar and withdrew her applications for (b) (6) with prejudice. The respondent indicated that she would be proceeding on her application for adjustment of status in conjunction with a section 212(i) waiver of her inadmissibility (I.J. Writ. Dec. at 4).² The matter was set for a final hearing on the merits of her adjustment application on August 22, 2012 (I.J. at 4).

On the day of the respondent's final hearing, the DHS filed in court a Form I-261 substituting the charge of removability from section 237(a)(1)(A) of the Act to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), thus shifting the burden to the respondent to establish that she in fact, had been admitted to the United States (I.J. Writ. Dec. at 4-5; Tr. at 15-17; Exhs. 1, 2). The Immigration Judge offered the respondent a continuance to respond to the new and substituted charges, but the respondent's counsel, Peter Hill, declined the offer of a continuance and sought to proceed with the respondent's hearing (I.J. Writ. Dec. at 5; Tr. at 21). The Immigration Judge ultimately determined that the respondent's testimony was not credible and sustained the substituted charge of removability, which resulted in the respondent's statutory ineligibility for adjustment of status under section 245(a) (I.J. Writ. Dec. at 11-19, 24).

We find that the respondent established prejudice. We acknowledge that DHS has the authority under 8 C.F.R. § 1003.30 to substitute charges of removability at any time. However, here, the DHS filed the I-261 at the respondent's final hearing, over 10 years after the commencement of removal proceedings, and after the respondent had already conceded to the original charge of removability. Moreover, the respondent detrimentally relied upon these pleadings when she earlier withdrew her (b) (6) applications with prejudice. Finally, we find that the respondent was prejudiced by her former counsel's waiver of a continuance to research, obtain evidence and prepare to rebut the DHS's substituted charge of removability. Accordingly, the respondent's unopposed motion is granted and the record is remanded for the respondent to address the allegations and substituted charge of removability in the Form I-261 and to apply for any available relief. On remand, the parties should be permitted to submit additional evidence and testimony.

Accordingly, the following order will be entered.

² The respondent required a waiver of her inadmissibility under section 212(i) of the Act due to her use of a fraudulent passport to enter the United States.

ORDER: The motion to reopen is granted and the record is remanded for further proceedings in accordance with this decision, and entry of a new decision.

Molly Randall Clark
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Baltimore, MD

Date: SEP 15 2015

In re: (b) (6)

IN (b) (6) PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT: A. Tony Heper, Esquire

ON BEHALF OF DHS: Mary C. Lee
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

The applicant moves the Board to reopen these (b) (6) proceedings to enable him to seek Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). See section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The Department of Homeland Security (DHS) opposes reopening. We first note that the DAPA program has been enjoined and has not yet been implemented. Moreover, deferred action is in any event separate and apart from these proceedings, and any request for deferred action must be made to the DHS. See, e.g., *Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982) (deferred action status is a matter of prosecutorial grace).

The applicant has also submitted an updated application for (b) (6) with this motion. The applicant, however, has not offered supporting evidence with the motion in compliance with the regulations at 8 C.F.R. § 1003.2(c)(1), nor does the application reflect a prima facie case of eligibility for (b) (6) or related relief. Further, the motion does not demonstrate an exceptional situation warranting sua sponte reopening. See *Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"); 8 C.F.R. § 1003.2(a). Accordingly, the applicant's motion to reopen is denied. See generally *Matter of Coelho*, 20 I&N Dec. 464, 472-72 (BIA 1992) (explaining that a party who seeks a remand or reopening of proceedings to pursue relief bears a "heavy burden" of proving that if proceedings before the Immigration Judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case).



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Bloomington, MN

Date:

JUN - 1 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Vincent M. Ekeh, Esquire

APPLICATION: Reopening

In a decision dated May 18, 2007, the Immigration Judge found the respondent removable as charged; denied her applications for (b) (6); and ordered her removal to Sudan (with an alternate order of removal to Kenya). On October 24, 2008, the Board dismissed the respondent's appeal from the Immigration Judge's decision denying her applications for relief. On March 4, 2016, the respondent filed the instant motion to reopen to reapply for (b) (6) and related relief. The motion is untimely and will be denied. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2).

During the proceedings before the Immigration Judge, the respondent claimed to be a native and citizen of Sudan, and to (b) (6) in that country. The Immigration Judge found, however, that the respondent did not testify credibly in support of her claims, and did not establish her identity as a native and citizen of Sudan. The respondent now claims to (b) (6). The respondent, who (b) (6), also claims that she (b) (6), and (b) (6).

The respondent has offered an updated (b) (6) in which she maintains that she is a citizen of Sudan. She has not, however, offered evidence to overcome the Immigration Judge's adverse credibility determination and to establish her identity as a citizen of Sudan. See *Matter of S-Y-G-*, 24 I&N Dec. 247, 258 (BIA 2007) (noting that it is the applicant's heavy burden to show, inter alia, that the proffered evidence supports a prima facie case for a grant of (b) (6)). We also note that the respondent has offered no medical evidence with this motion. See 8 C.F.R. § 1003.2(c)(1).

Upon consideration, we find that the respondent has not demonstrated that an exception to the filing deadline applies to this motion, or that an exceptional situation is present in this case to warrant reopening sua sponte. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in

hardship”); 8 C.F.R. §§ 1003.2(a), (c)(3). Accordingly, the motion to reopen will be denied. The respondent’s request for a stay of removal is also denied.¹

ORDER: The motion to reopen is denied.



FOR THE BOARD

¹ The respondent’s request for a change of venue is moot.

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date: MAR - 7 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

On April 2, 2015, the Board dismissed the respondent's appeal. On January 27, 2016, the respondent filed the current motion to reopen. Sections 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) & (C)(i); 8 C.F.R. § 1003.2(c). The motion will be denied as untimely filed.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of deportation or removal. See section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) based on (b) (6) in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BLA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BLA 1999).

The respondent seeks reopening to pursue a claim for (b) (6) and (b) (6). The respondent contends that country (b) (6) in Peru because (b) (6) is again gaining power. In support of his motion, he has submitted his declaration, two articles on (b) (6), and the 2014 Country Report on Peru.

The motion is denied because the evidence attached to the motion does not demonstrate (b) (6) in Peru. Rather, the evidence reflects a continuation of conditions presented to and considered by the Immigration Judge at the respondent's hearing. Compare Motion to Reopen, Articles and 2014 Country Report with Exh. 10, Tabs A-P; Exhibit 11, Tabs A-H. Accordingly, the motion will be denied as untimely filed.

ORDER: The motion and related request for a stay of removal are denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 24 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Houman Varzandeh, Esquire

APPLICATION: Reopening

This matter was last before the Board on February 9, 2012, when we dismissed the respondent's appeal. On April 8, 2016, more than 4 years after the Board's order, the respondent filed a motion to reopen. The Department of Homeland Security has not responded to the motion. The motion will be denied.

The respondent's motion is untimely, as it was not filed within 90 days of the Board's final administrative decision.¹ Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, urges that her motion falls within the exception to the time limitations for motions to reopen to apply or reapply for (b) (6) arising in the country of nationality. Section (b) (6).

Specifically, the respondent argues that the (b) (6) in Georgia became (b) (6). The respondent cites two events, or lines of events, in support of this argument. First, the respondent states that (b) (6) at the (b) (6), 2013, (b) (6) in 2015. Second, in (b) (6) 2016 (b) (6).

The respondent argues that these events show the (b) (6), in that country, as well as the (b) (6), and establish her prima facie eligibility for (b) (6) and related forms of relief. In support of the motion, the respondent has submitted a number of media articles and reports regarding country conditions in Georgia.

¹ The respondent's motion states in one part that she now submits this timely motion to reopen (Motion, at 3). As noted above, the respondent's motion to reopen is untimely. However, this will not change our analysis or decision because the motion to reopen is based (b) (6) as set forth in Section (b) (6) of the Act and (b) (6).

(b) (6)

The evidence submitted by the respondent is insufficient to show (b) (6) s in Georgia with (b) (6). Although (b) (6) in Georgia in 2000, as noted in the Board's prior decision it was not (b) (6), and there was a (b) (6), at the time of the respondent's previous hearing in 2010. Accordingly, the (b) (6) existed at the time of the respondent's hearing, as shown in part in the documents submitted at the hearing as well as in the documents submitted with the motion. With respect to (b) (6), these are also similar to the conditions that existed at the time of the respondent's previous hearing.

The documents submitted also show that, despite the (b) (6), there has been general movement towards (b) (6); on the other hand, such movement also (b) (6) (Motion Exh. B; Motion Exh. C, at 6-8). One article analyzed that the (b) (6), 2013, (b) (6), such as the (b) (6) values (Motion Exh. C, at 8). The respondent also submitted an article stating that in (b) (6) 2015 (b) (6) in the (b) (6) 2013 (b) (6) (Motion Exh. C).

Nevertheless, other than (b) (6), 2013, (b) (6) linked to (b) (6) around that time (Motion Exh. C, at 8), the evidence submitted does not show (b) (6) in Georgia. As the respondent has noted in the motion, the Department of State's 2014 Georgia Country Reports on Human Rights Conditions stated that (b) (6) as one of the (b) (6) (Motion, at 5; Motion Exh. H, at 21), but did not report (b) (6).

The respondent argues that the (b) (6), 2014, for (b) (6) (Motion, at 5). However, the evidence submitted at the hearing showed that a similar (b) (6) in 2007 for (b) (6), after (b) (6) (Exh. 9-H, at 39). The evidence also shows that (b) (6) in 2014 (Motion Exh. C, at 8; Motion Exh. H, at 21-22).

As to the possibility of a proposal to amend Georgia's constitution to preclude (b) (6), the respondent argues, as (b) (6), that this will further (b) (6) (Motion, at 11; Motion Exh. E). Nevertheless, the evidence shows that the law of Georgia has not (b) (6) under its civil code (Motion Exh. E). Therefore, to the extent a (b) (6) is not recognized under the laws of Georgia, this is the continuation of the (b) (6) that existed at the time of the respondent's previous hearing, rather than "(b) (6)". The evidence submitted also show that the idea of constitutional amendment is being "floated" by some politicians in response to a lawsuit brought in the constitutional court in (b) (6) 2016 (b) (6) in Georgia, but its outlook is unclear as some

(b) (6)

politicians already distanced themselves from this idea (Motion Exhs. D-E). In any event, the respondent admits that (b) (6) (Motion, at 11).

The evidence submitted also shows that the Georgian (b) (6), partly based on international pressures (Motion Exh. C, at 10). The respondent argues that Department of State's 2014 Country Report shows that the Georgian (b) (6) who (b) (6) (Motion, at 5, *citing* Motion Exh. H, at 22). However, the 2014 Country Report stated that the Constitutional Court declared (b) (6) in its strategic documents regarding (b) (6); and a (b) (6) (Motion Exh. H, at 22). Although there were (b) (6), the Country Report stated that the government ministry issued an apology for a statement made by a former minister (Motion Exh. H, at 21). Furthermore, the evidence submitted at the time of the respondent's hearing showed that similar negative statements were made by public figures.

We have also reviewed the Department of State's 2015 Georgia Country Reports on Human Rights Conditions, published on April 13, 2016, after the respondent's motion was filed, and available at <http://www.state.gov/documents/organization/253061.pdf>.² The 2015 Country Report also reported that (b) (6) (at 46), but did not cite (b) (6) based on the (b) (6). Furthermore, (b) (6) on (b) (6) (at 25-26).

The 2015 Country Report also stated that in (b) (6) the (b) (6) partially upheld (b) (6), stating that the ministry had (b) (6) in the (b) (6) (*id.*). On (b) (6) complied with.

In sum, the evidence submitted with the motion and the 2015 Country Report show that the (b) (6), and (b) (6). However, these are essentially the same or similar conditions that existed at the time of the respondent's previous hearing. The evidence also show

² See 8 C.F.R. § 1003.1(d)(3)(iv) (the Board may take administrative notice of commonly known facts or the contents of official documents).

(b) (6)

that (b) (6) in Georgia (b) (6),
which resulted in (b) (6) in 2013. Nevertheless, taken as a whole, the current country conditions are not “qualitatively” different from those that existed at the time of the respondent’s hearing. (b) (6) ■ (b) (6) (9th Cir. 2004) (noting that the critical question is whether (b) (6) that an alien who previously did not have a legitimate claim for (b) (6), and that the new evidence of country condition must be “qualitatively different” from that shown at the time of the hearing); *see also* (b) (6) ■ (b) (6) (9th Cir. 2010). Furthermore, the respondent did not show that the respondent is (b) (6) in Georgia if the proceedings were reopened.³ Accordingly, the respondent’s motion will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

³ In the prior decision, the Board concluded that the respondent did not establish (b) (6), and the United States Court of Appeals for the Ninth Circuit upheld this finding. (b) (6) ■ (b) (6) (9th Cir. May 12, 2015) (unpublished).

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date:

FEB 29 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jordan H. Schweller, Esquire

APPLICATION: Reopening

This matter was last before the Board on March 24, 2015, when we dismissed the respondent's appeal. On November 12, 2015, almost 8 months after the Board's order, the respondent filed a motion to reopen. The Department of Homeland Security has not responded to the motion. The motion will be denied.

The respondent's motion is untimely, as it was not filed within 90 days of the Board's final administrative decision. Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, argues that his motion falls within the exception to the time limitations for motions to reopen to apply or reapply for (b) (6) in the country of nationality. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The respondent also argues that the Immigration Judge did not properly advise him of his rights and remedies.

We will first address the respondent's argument that the Immigration Judge did not properly advise him, when he waived his application for (b) (6) and related forms of relief, "that he was giving up his right to seek protection from return to Mexico" (Motion, at 5-6). The respondent argues that the Immigration Judge did not properly advise the respondent regarding "his purported waiver of his right to apply for (b) (6); what was required of the [r]espondent to apply for said relief; and what the relief would provide to him, e.g., protection from removal" (Motion, at 7). The respondent also argues that the Immigration Judge did not summarize some off-the-record conversations with the respondent regarding (b) (6) to Mexico (*id.*). The respondent argues that these failures constituted a violation of his due process rights (Motion, at 6-7).

To the extent the respondent claims errors in the Immigration Judge's action or decision, or in the Board's decision affirming the Immigration Judge's decision, his motion constitutes a motion to reconsider in substance. See *Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BLA 2006) (a motion to reconsider contests the correctness of the original decision based on the previous factual record, while a motion to reopen seeks a new hearing based on new or previously unavailable evidence). Therefore, such arguments should have been presented on appeal or in a timely-filed motion to reconsider. The respondent argued on appeal that the Immigration Judge

erred in denying his applications for (b) (6). The Board disagreed, as the Immigration Judge made no such determination but the respondent has waived his opportunity to pursue an application for (b) (6).¹ The respondent's motion is untimely as a motion to reconsider, as it was not filed within 30 days of the Board's prior decision. Section 240(c)(6)(B) of the Act; 8 C.F.R. § 1003.2(b)(2).

The respondent argues that the Immigration Judge's failure to protect his due process rights requires an equitable tolling of the motion time limitations, citing *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). However, *Matter of A-P-* did not address the question of when a motion to reopen or reconsider time limitations may be equitably tolled. The respondent further has not shown why he could not raise these arguments on appeal or file a timely motion to reconsider. The respondent, therefore, did not show that equitable tolling of his motion to reconsider time limitations is warranted. Accordingly, the motion to reconsider will be denied.²

We will next address the respondent's arguments regarding (b) (6). The respondent argues that the (b) (6) since his previous hearing in December 2014. He argues that in 2003 or 2004³ he was (b) (6) and in 2013 his cousin was (b) (6), and further "a month ago" his mother in Mexico

¹ The United States Court of Appeals for the Ninth Circuit denied the respondent's petition for review the Board's prior decision in an unpublished order, without specifically reversing the Board's determination that the respondent waived his application for (b) (6) and related forms of relief. (b) (6) (9th Cir. Sep. 16, 2015) (unpublished order).

² Furthermore, the record shows that the Immigration Judge advised the respondent that he could apply for (b) (6) and related protections, and explained to him what elements he will need to prove, and the respondent stated "I have nothing to prove to qualify for (b) (6) (Tr. at 16). When the Immigration Judge asked "What do you mean?" he stated "I waive (b) (6) (Tr. at 16). The Immigration Judge further informed the respondent that, if the Immigration Judge gives him (b) (6) application, he will be given about a month to complete and file the form, although he may have more time to submit documents; the respondent replied "No, then I, I waive" (Tr. at 17). Earlier, the Immigration Judge explained to him that the respondent would be removed from the United States if he cannot qualify for any form of relief (Tr. at 11). Therefore, the record reflects that the respondent understood that the "waiver" of (b) (6) meant that he would not apply for (b) (6) and, without being granted some form of relief from removal, that he would be subject to an order of removal.

³ The respondent's (b) (6) application states that (b) (6) occurred in 2003 (Motion Exh. A, at 5), but the respondent's statement claims that (b) (6) in (b) (6) of 2004 (Motion Exh. B, at 69).

⁴ The respondent argues that he tried to explain to the Immigration Judge that he needed some time to obtain the evidence of (b) (6) that occurred in (b) (6) 2004 but she "seemed upset" (Motion Exh. B, at 69). However, the respondent does not point to the part of transcript to
(continued...)

(b) (6)

(b) (6) the respondent (Motion Exh. B). In support of the motion, the respondent submitted (b) (6) application, his statement, and a number of reports and articles regarding (b) (6) in Mexico (Motion Exhs. A-B).

The evidence submitted by the respondent is insufficient to show (b) (6) in Mexico since his previous hearing in December 2014. The evidence submitted shows (b) (6). However, the respondent did not show that these are qualitatively (b) (6) in December 2014. (b) (6) (9th Cir. 2004) (noting that the critical question is whether (b) (6) that an alien who previously did not have a legitimate claim for (b) (6), and that the new evidence of (b) (6) must be "qualitatively different" from that shown at the time of the hearing); *see also* (b) (6) (9th Cir. 2010). Since the respondent did not show (b) (6) or related forms of relief, his motion to reopen will be denied as untimely. In addition, the respondent has not sufficiently argued or shown in the motion that (b) (6) would be on (b) (6), as the respondent has

(...continued)

support this assertion. Furthermore, the Immigration Judge stated, as noted in the footnote above, that the respondent could have a month to complete the (b) (6) application, and "If you're still working on documents, that's fine" and the (b) (6) hearing would not be held until March or the end of February [of 2015] (Tr. at 17). The respondent suggests in the brief that the respondent waived his (b) (6) application "[a]fter the [Immigration Judge] explained the length of time [the r]espondent would remain in custody" (Motion, at 14). However, the respondent's question ("If you give me the (b) (6) application, how long do I need to prove it?"), as well as the Immigration Judge's answer, was about the length of time the respondent will be given to complete the (b) (6) application (Tr. at 16-17), not necessarily the time period the respondent would remain in custody. Indeed, as the respondent's bond hearing was held after this exchange (Tr. at 17), neither the Immigration Judge nor the respondent could have known whether and how much longer he would remain in custody.

The respondent also asserts that he tried to bring up the 2003 or 2004 (b) (6) when they were off the record and the Immigration Judge had stopped the recording, but the Immigration Judge stated that the (b) (6) option had been closed already (Motion Exh. B, at 69-70). The transcript of the proceedings shows only one instance where the recording was stopped, and that was to conduct the bond hearing (Tr. at 17). The recording of the bond hearing was off the record of the removal proceedings, as bond proceedings are separate and apart from removal proceedings. *See* 8 C.F.R. § 1003.19(d); *Matter of R-S-H*, 23 I&N Dec. 629, 630 n.7 (BIA 2003). After the bond hearing was completed, the recording for the removal hearing resumed, and the Immigration Judge again noted that the respondent did not want to file an application for (b) (6) (Tr. at 17), to which the respondent made no objection or comment.

asserted that the (b) (6), and other means (Motion Exh. B, at 71).

Finally, the respondent urges us to sua sponte reopen his proceedings under 8 C.F.R. § 1003.2(a). We do not find that the respondent's case presents an exceptional situation that would warrant the Board's exercise of its discretion to reopen sua sponte. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (stating that the power to reopen sua sponte "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). Based on the above, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Portland, OR

Date: SEP - 3 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Joseph Justin Rollin, Esquire

ON BEHALF OF DHS: Sarah C. Lara
Assistant Chief Counsel

This case was last before us on June 9, 2015, at which time we dismissed the respondent's appeal from the Immigration Judge's November 6, 2013, decision to pretermitt his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), and the respondent became the subject of a final order of removal. The respondent has now filed a timely motion to reopen proceedings on July 8, 2015. The Department of Homeland Security (DHS) opposes the motion, which will be denied. The respondent's request for a stay of removal is denied as moot.

A motion to reopen shall not be granted unless it appears that the evidence sought to be offered "was not available and could not have been discovered or presented at the former hearing." See 8 C.F.R. § 1003.2(c)(1). Further, this Board has held that a party who seeks to reopen proceedings to pursue a discretionary grant of relief from removal bears a "heavy burden" of demonstrating that if his motion to reopen were granted, the new evidence presented would likely change the result in the case. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

In his motion to reopen, the respondent requests that this Board (or, alternatively, the Immigration Judge on remand) administratively close his case to allow him to apply for a provisional unlawful presence waiver with the United States Citizenship and Immigration Services (USCIS). In conjunction with the notice of approval of the Form I-130, which was filed on his behalf as the spouse of a United States citizen, the respondent has submitted, *inter alia*, Forms G-325A and I-601A, and voluminous documents in support of his I-601A waiver application.

Notwithstanding the respondent's evidence, a provisional unlawful presence waiver is not available to the respondent because he has a final order of removal entered in his case. See 8 C.F.R. § 212.7(e)(4)(vi)).

As such, it is not appropriate to reopen and administratively close these proceedings pursuant to *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), or to reopen these proceedings and remand the record for the Immigration Judge's consideration of such a request. The respondent's motion to reopen will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date:

APR 28 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Michael P. DiRaimondo, Esquire

APPLICATION: Reopening

This matter was last before the Board on June 28, 2011, when we denied the respondent's motion to reopen. On February 12, 2008, the respondent filed another motion to reopen.¹ The Department of Homeland Security has not responded to the motion. The motion will be denied.

The respondent's motion to reopen is untimely and number-barred. Section 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2); *Matter of Oparah*, 23 I&N Dec. 1 (BIA 2000); *Matter of L-V-K-*, 22 I&N Dec. 976 (BIA 1999). The respondent, however, urges that his motion falls within the exception to the time and number limitations for motions to reopen to apply or reapply for (b) (6) arising in the country of nationality. Section (b) (6). Specifically, the respondent argues that he (b) (6) in Albania (b) (6), and that (b) (6) in Albania (b) (6) upon his return has (b) (6). In support of the motion, the respondent submitted (b) (6) application and a "Declaration" and curriculum

¹ The respondent submitted a document entitled "Declaration," which includes mixed legal and factual statements by the counsel, and we will treat this document as a motion. However, to the extent the factual assertions in this document are not based on personal knowledge of the counsel, it does not qualify as evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

² The respondent again asserts that he was ill on the day of his previous hearing in July 2003, and that he did not receive a Notice of Hearing (Motion Exh. F Attachment, at 4). Whether the in absentia order of removal in the respondent's case should be rescinded based on a lack of notice or exceptional circumstances was the subject of the respondent's previous motions to reopen and the Immigration Judge's and the Board's previous decisions, and we decline to revisit this matter. However, an alien who is subject to an in absentia removal order need not first rescind the order before seeking reopening of the proceedings to apply for (b) (6) and (b) (6) arising in the country of the alien's nationality. (b) (6) (BIA 2013).

(b) (6)

vitae of (b) (6), his proposed expert on country conditions of Albania (Motion Exhs. F-G).

The evidence submitted by the respondent is insufficient to show (b) (6) in Albania. We first note that (b) (6) that the respondent claims he and his family (b) (6) predated his previous hearing date in July 2003. Therefore, they are not "new facts" supported by "new evidence" that was not available and could not have been discovered or presented at the previous hearing. Section 240(c)(7)(B) of the Act; 8 C.F.R. § 1003.2(c)(1). Furthermore, although the respondent has (b) (6) in Albania, the respondent has not shown that (b) (6) since 2003 (Motion Exh. F).

The Declaration of (b) (6) states that the (b) (6) of Albania has (b) (6) and that continuing (b) (6) Albania from fully establishing the rule of law (Motion Exh. G, at 3-5). The respondent also argues that the (b) (6) and (b) (6), including the (b) (6); that efforts to (b) (6) have not been successful; that (b) (6) has been made in critical areas; and that there (b) (6) during elections in 2009, 2011, 2013, and 2015 (Motion, at 2-10; Motion Exh. G). Nevertheless, the Declaration shows that these are (b) (6) in Albania, similar to the (b) (6) at the time of the respondent's 2003 hearing date, rather (b) (6). While the Declaration cites the Department of State's 2012 and 2013 Albania Country Reports on (b) (6) in Albania, we note that the Department of State's 2002 and 2003 reports also reported similar conditions (available at <http://www.state.gov/j/drl/rls/hrrpt/2003/27820.htm> and <http://www.state.gov/j/drl/rls/hrrpt/2002/18349.htm>). See 8 C.F.R. § 1003.1(d)(3)(iv) (providing that the Board may take administrative notice of commonly known facts or the contents of official documents). The respondent argues that the (b) (6) is a (b) (6). Nevertheless, (b) (6) and was (b) (6) previously, including at the time of the respondent's previous hearing date in 2003, as shown in the Department of State's 2001 Albania Country Reports on (b) (6). The evidence submitted does not show (b) (6) in Albania, such that the respondent's motion falls within the exception to the motion to reopen time and number limitations.

Based on the above, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Honolulu, HI

Date: OCT 16 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James A. Stanton, Esquire

ON BEHALF OF DHS: Chandu Latey
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under
section 212(a)(7)(B)(i)(II), I&N Act [8 U.S.C. § 1182(a)(7)(B)(i)(II)] -
No valid nonimmigrant visa or border crossing card

APPLICATION: Adjustment of Status

This case was last before us on April 16, 2013, when we dismissed the respondent's appeal from an Immigration Judge's decision denying her application for adjustment of status. On January 9, 2015, the United States Court of Appeals for the Ninth Circuit remanded this matter on the motion of the Department of Homeland Security ("DHS"), which sought remand for the Board to address the application to these proceedings of our decision in *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). For the reasons that follow, the record will be remanded for further proceedings consistent with this order.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. See 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. See 8 C.F.R. § 1003.1(d)(3)(ii).

The procedural history of this matter will be reviewed briefly. The respondent entered the United States in October 2003 pursuant to a visa filed by her then-fiancé, who she married within 90 days. In November 2003, she filed an application for adjustment of status. In May 2006, her husband sought to withdraw the visa petition. The DHS's Citizenship and Immigration Services ("CIS") denied the adjustment of status application in September 2007, finding that because a fraudulent affidavit of support was filed with the "K" visa petition, the petition was invalid, and the respondent could not adjust her status because her October 2003 entry was not a lawful admission.¹

¹ A previous, i.e., June 2006, CIS decision erroneously denied the adjustment of status application based on the attempted withdrawal of the visa petition by the respondent's

The respondent was placed into removal proceedings in April 2008 (Exh. 1). She divorced the "K" visa petitioner and married another United States citizen, to whom she remains married presently. She has two United States citizen children with her present husband, and he has filed a visa petition on her behalf, which was approved on November 25, 2009 (LJ at 2). The respondent filed applications for adjustment of status and waivers of inadmissibility. These applications were denied by the Immigration Judge in December 2010, on the basis that the respondent was ineligible to adjust her status through her marriage to her present husband, since the Immigration and Nationality Act prohibits the recipient of a K visa from adjusting status on a basis other than marriage to the K visa petitioner (*Id.*). Furthermore, the Immigration Judge found (in accord with the CIS decision of September 2007), that the respondent was not legally "admitted" to the United States when she entered in 2003, and that, therefore, she could not adjust her status through her marriage to the K visa petitioner (*Id.*).

In our April 2013, decision, we affirmed the Immigration Judge's decision that the respondent could not adjust her status through her present marriage. Section 245(d) of the Act prohibits the respondent, who entered the United States as the recipient of a K visa, from adjusting her status by any means other than through her marriage to the petitioner of that visa. *Matter of Sesay*, 25 I&N Dec. 431, 437 (BIA 2011). This aspect of our decision is not at issue in the Ninth Circuit's remand.

Rather, at issue is the respondent's argument that she remains eligible to adjust her status through the visa petition filed by the "K" visa petitioner, which permitted her entry into the United States as a fiancée of a United States citizen. She argues that notwithstanding the end of that marriage, she remains eligible to adjust on this petition because she married the citizen who petitioned for her, and because although this marriage ended in 2009, it was bona fide at its inception. See Respondent's Brief at 10-14. The respondent's adjustment of status application arising out of this marriage was last denied by CIS in September 2007 after consideration of the respondent's motion to reopen, however, she renewed the application for adjustment through her first marriage in removal proceedings before the Immigration Judge. As noted, however, the Immigration Judge found that the respondent could not adjust status via her first marriage since she was never lawfully admitted to the United States when she entered on the K visa.

Turning to the issue raised in the Ninth Circuit's recent remand of this record, we acknowledge that our issuance of *Matter of Qilantan*, *supra*, undermines the Immigration Judge's reasoning for finding the respondent ineligible for adjustment of status under section 245(a) of the Act. In *Matter of Qilantan*, *supra*, the Board held that in order to show that he or she has been "admitted" to the United States pursuant to section 101(a)(13)(A) of the Act, an applicant for adjustment of status under section 245(a) of the Act need show only procedural regularity. Therefore, the fact that the respondent's 2003 admission was not "lawful" (due to the

first husband. In response to the motion of the respondent, the CIS acknowledged that under the circumstances of this case, a K visa could not be withdrawn at the request of the petitioner. Notwithstanding this, as previously noted, the application was finally denied on September 2007 and the respondent never was accorded conditional permanent resident status. *Cf. Choin v. Mukasey*, 537 F.3d 1116, 1119 (9th Cir. 2008). The respondent did not file an appeal from the September 2007 CIS decision.

fraudulent affidavit of support filed with the K visa) does not pose a bar to showing that she has been "admitted" for purposes of applying for adjustment of status under section 245(a) of the Act.

But while *Matter of Quilantan* makes it clear that the respondent meets the requirement in section 245(a) that she was "inspected and admitted," the respondent must also demonstrate that she is "admissible to the United States for permanent residence." Although admitted in 2004 with procedural regularity, her admission was obtained in a manner that appears to leave her substantively inadmissible for purposes of adjustment of status. As such, she would require a waiver addressing her inadmissibility under section 212(a)(6)(C)(i) of the Act.

Moreover, to obtain relief, the respondent must also demonstrate that "an immigrant visa [was] immediately available . . . at the time [her adjustment of status] application is filed." See section 245(a) of the Act. In *Matter of Sesay*, 25 I&N Dec. 431, 439-440 (BIA 2011), we held that for a fiancé visa holder, the requirements of section 245(a) of the Act (i.e., as to visa eligibility and availability) are satisfied at the time the fiancé is admitted to the United States. Therefore, to determine the respondent's eligibility to adjust her status via her first marriage, the Immigration Judge should determine whether a visa was available to her at the time she was admitted, notwithstanding the fact that this admission was not legally sound. In this regard, we note that the record does not reflect that the original K visa was revoked, just that the respondent's application to adjust her status based on the marriage to the K petitioner was denied. In the event that the Immigration Judge determines that a visa remains available for the respondent, further proceedings should follow to determine whether the respondent's marriage to the K petitioner was bona fide, see *Matter of Sesay*, *supra*, at 440, and whether she is eligible for and deserving of a discretionary waiver of inadmissibility and adjustment of status.

For the foregoing reasons, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with this order.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: APR 27 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Marjan Hadjian Bahmani, Esquire

APPLICATION: Reconsideration

This matter was last before the Board on June 16, 2015, when we remanded the case to the Immigration Court for further proceedings. The respondent has now filed a timely motion to reconsider. The motion will be denied.

A motion to reconsider must identify an error of fact or law in the Board's prior decision. See section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006).

There is no error of fact or law, or any particular aspect of the case that was overlooked in our previous decision. In our order dated June 16, 2015, we remanded this matter to the Immigration Judge to conduct further fact-finding, including taking testimony if necessary, to and further address whether the respondent received the (b) (6) and whether the respondent met his burden of establishing that he warrants relief as a matter of discretion. In doing so, we noted that it was not clear whether the Immigration Judge had considered the totality of record (BIA Dec. dated June 16, 2015, at 2). In this regard, the Immigration Judge did not fully address the fact, or the implications, of the respondent's refusal to answer questions during his proceedings regarding matters relevant to his application, including whether he received the (b) (6) (DHS's Brief at 6; Tr. at 167-68, 177-78, 184).

The respondent properly notes that, under certain circumstances, he is entitled to invoke his Fifth Amendment right against self-incrimination during immigration proceedings (Respondent's Motion to Reconsider, at 2). However, as a removal hearing is a civil proceeding, an alien's refusal to testify may form the basis of an adverse inference against him in the removal proceeding. See *U.S. v. Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984); see also *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (holding that in immigration proceedings, it is well established that "there is no prohibition against drawing an adverse inference when a petitioner invoked his Fifth Amendment right against self-incrimination").

While the Immigration Judge is not required to draw an adverse inference when a witness invokes his Fifth Amendment right against self-incrimination (Respondent's Motion to Reconsider, at 5), an Immigration Judge does have broad discretion to accept and assign evidentiary weight to evidence, may make reasonable inferences from direct and circumstantial evidence in the record as a whole, and is not required to accept a respondent's account where

other plausible views of the evidence are supported by the record. See *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011).

In this case, the respondent testified that he learned the contents of his (b) (6) application prior to his interview with (b) (6) (Tr. at 149-51, 169), yet he invoked his Fifth Amendment right against self-incrimination when he was asked about the (b) (6) interview and why he did not tell the (b) (6) that the statements in his application were false (Tr. at 176-78, 184). Additionally, after the respondent's refusal to answer the questions, the DHS presented evidence from the (b) (6) regarding his standard procedures during (b) (6) interviews, which include placing the applicant under oath, reviewing the (b) (6) application and having the applicant sign the application, which contains the (b) (6) (Tr. at 286, 291, 303-07; Exhs. 4-6). The Immigration Judge declined to draw a negative inference from the respondent's initial refusal to answer the DHS's questions on cross-examination regarding his (b) (6) (I.J. at 7-8; Tr. at 167-68, 176-78, 184).

Under the circumstances, the Immigration Judge erred in his reliance on *Matter of Guevara*, 20 I&N Dec. 238, 244 (BIA 1991), in "declining to fault the respondent for his initial refusal to answer the Government's questions" on the issue of the (b) (6), an issue on which the DHS had the burden (I.J. at 7). In this regard, the Immigration Judge clearly erred in finding that "[a]t the time, the Government had presented no evidence suggesting that Respondent had filed a (b) (6)" (I.J. at 7).

As discussed above, prior to his refusal to answer the DHS's questions, the respondent had already testified, on direct examination, that he knew the contents of his (b) (6) application prior to the interview with the (b) (6), and admitted that the contents were fabricated and false (Tr. at 149-51). Thus, even before the DHS called the (b) (6) to support its position, the record contained evidence relevant to the respondent's potential (b) (6). In light of the above, it is not clear that the Immigration Judge's determination that a negative inference is not warranted was based on the record as a whole. *Matter of R-*, 4 I&N Dec. 720, 721 (BIA 1952) (to afford the privilege against self-incrimination, there must be some real danger that the answer of the witness may help convict him of a Federal crime); *Matter of Santos*, 19 I&N Dec. 105, 110, 113 n.2 (BIA 1984) (noting that the privilege against self-incrimination did not apply where an alien overstayed his allotted time, as no crime was implicated).

The respondent's disagreement with the weight given to certain evidence, or with our determination that the record warrants further review, does not amount to an error of fact or law. See *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (remanding to the Immigration Judge because of insufficient factual findings and legal analysis); 8 C.F.R. § 1003.1(d)(3)(iv) (limiting the Board's fact-finding authority and providing that the Board may remand the proceeding to the Immigration Judge if further fact-finding is needed); see also *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) (noting that the Board is "an appellate body whose function is to review, not to create, a record"). As there is no error of fact or law, nor any particular aspect of the case that was overlooked in our prior decision, we deny the respondent's motion to reconsider. 8 C.F.R. § 1003.2(b); *Matter of O-S-G-*, *supra*.

Accordingly, the following order will be entered.

(b) (6)

ORDER: The respondent's motion is denied.

A handwritten signature in black ink, appearing to read "L. M. 8/16", is written over a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - San Francisco, CA

Date: FEB 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Cynthia A. Gutierrez
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on July 8, 2013, when we denied the respondent's untimely motion to reopen. On December 29, 2015, the respondent filed another motion to reopen. The Department of Homeland Security has opposed the motion. The motion will be denied.

The respondent's motion to reopen is untimely and number-barred. Section 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, argues that the (b) (6) in India (b) (6), such that his motion falls within the exception to the time and number limitations for motions to reopen to apply or reapply for (b) (6) based on (b) (6) arising in the country of nationality. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). Specifically, the respondent argues that (b) (6) in India are (b) (6), and have visited his family house, as well as friend's and relative's houses, in 2015. The respondent also argues that (b) (6). In support of the motion, the respondent submitted a number of documents, including printouts of Internet blog posting and other articles, the Department of State's 2014 India Country Reports on Human Rights Practices, and a statement of his friend.

The evidence submitted by the respondent does not establish (b) (6) in India material to the respondent's (b) (6) claims. The Department of State report and articles submitted show that there are (b) (6) in India, including (b) (6). They also describe certain recent (b) (6) in Punjab. However, these are essentially similar to the (b) (6) that existed at the time of the respondent's 2006 hearing, as shown in part in the documents submitted at that time, rather than (b) (6). (b) (6) (9th Cir. 2004) (noting that the critical question is whether (b) (6) sufficiently that an alien who previously did not have a legitimate claim for (b) (6) now has a

(b) (6)

(b) (6); see also (b) (6) (9th Cir. 2010). In addition, the respondent's claim that (b) (6) because of (b) (6) is essentially the same claim made at his hearing and in his prior motion to reopen. As noted in the Board's prior decision, the Immigration Judge made an adverse credibility finding as to the respondent's claims of (b) (6) in India, and the Board and the United States Court of Appeals for the Ninth Circuit upheld the adverse credibility finding. (b) (6) (9th Cir. Jul. 14, 2011) (unpublished); see also (b) (6) (9th Cir. Nov. 24, 2015) (unpublished). The respondent's current motion does not show that a different outcome is warranted as to this finding, and does not demonstrate (b) (6) in India material to his eligibility for (b) (6) or related forms of relief. See (b) (6) (9th Cir. 2008) (evidence was immaterial in light of prior adverse credibility determination).

The respondent also claims that he is now married to a United States citizen and is the beneficiary of an approved Form I-130 visa petition filed by her. This claim was also made in the respondent's prior motion to reopen. The respondent has not argued or shown that he became eligible for any form of relief based on this marriage, or that any motion to reopen based on this marriage would fall within any exception to the motion to reopen time limitations enumerated in section 240(c)(7)(C) of the Act and 8 C.F.R. § 1003.2(c)(3).

Based on the above, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date: JAN 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alexa T. Torres, Esquire

APPLICATION: Reopening

The respondent's motion to reopen is untimely filed by more than 11 years and will be denied on that basis. See section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). The motion has not been shown to qualify for any exception to the filing requirements imposed on motions to reopen.

Despite the absence of any specific information describing (b) (6) in China at the time of the respondent's June 16, 2003, hearing before the Immigration Judge, the numerous articles and country reports proffered in support of the pending motion reflect that (b) (6) China. Indeed, the Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *China: Profile of* (b) (6) (April 1998) ("1998 China Profile"), contained in the record, reflects that (b) (6) in varying regions of China, with some (b) (6) (Exh. 7). The (b) (6) described in the 1998 China Profile is not significantly different from that described in either the proffered "CHINAaid," 2014 *Annual Report*, (b) (6) in China, or the U.S. Commission on International Religious Freedom, 2013 *Annual Report*, reporting episodes of (b) (6) in varying degrees and regions of China in recent years (Respondent's brief at Tabs K, O). See also *Matter of S-Y-G-24* I&N Dec. 247, 253 (BIA 2007) (stating "in determining whether evidence accompanying a motion to reopen demonstrates a material change in country conditions that would justify reopening, we compare the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below").

Mere allegations of and documents indicating a (b) (6) do not sufficiently reflect a material change. Also, reports providing statistics for only the last few years may be useful in establishing a recent trend. However, even a worsening recent trend over the last several years does not necessarily represent a material change when compared to the conditions that existed at the time of the merits hearing. Further, while some of the proffered country information appears to (b) (6) or

(b) (6)

(b) (6), the respondent has not asserted that she is nor do we understand her to be (b) (6)

Additionally, without some evidence of reliability, we give little weight to the alleged letters from the respondent's father and sister in China. Such evidence consists of unauthenticated copies of documents that were created in support of the present request for reopening, were not subjected to cross examination, and are unsupported by independent evidence. *See, e.g., Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010) (affording little weight to unauthenticated copies of documents that failed to identify the authors, who were not subject to cross examination, and were obtained for the purposes of the hearing), *rev'd in part, Huang v. Holder*, 677 F. 3d 130 (2d Cir. 2012); *Matter of S-Y-G-*, 24 I&N Dec 247, *supra*, at 253 (BIA 2007) (requiring genuine, authentic, and objectively reasonable evidence for reopening). We are not inclined to overlook the noted deficiencies in the submitted letters particularly where, as here, no independent evidence of the reliability of the documents has been offered. In any event, the alleged letters do not describe or reflect that the respondent would be (b) (6)

(b) (6) in this country or (b) (6)

Thus, the only change shown is the respondent's (b) (6), which is a (b) (6) China such that the respondent's motion may be found to fall within the exception to the time limits applicable to motions to reopen. *See* (b) (6) (2d Cir. 2006); *see also* (b) (6) (2d Cir. 2008) (holding that aliens who have been ordered removed are not permitted "to disregard [those] orders and remain in the United States long enough to (b) (6) and initiate new proceedings via a new (b) (6) application").

On this record, the respondent has not provided an adequate basis to excuse the untimeliness of the present motion. Nor, has she demonstrated an exceptional circumstance that would warrant the reopening of these proceedings under the Board's discretionary sua sponte authority. *See, e.g., Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). Accordingly, we will enter the following order.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date: MAY - 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ronald Surin, Esquire

APPLICATION: Reopening

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen his removal proceedings to clarify the (b) (6) finding. The record before us does not contain a response from the Department of Homeland Security. The motion will be denied.

In an Immigration Judge's March 16, 2006, decision he made a (b) (6) finding regarding the respondent's 2002 (b) (6) application to the U.S. Citizenship and Immigration Services, and also granted (b) (6) to Haiti. The Board in its December 20, 2007, decision upheld the (b) (6) finding, and remanded the record to the Immigration Judge for background checks. In a January 7, 2009, memorandum order a different Immigration Judge granted the respondent (b) (6). Both parties waived appeal. The respondent filed the present motion in December of 2015. The motion is untimely. We conclude that the respondent does not present an exceptional situation for sua sponte reopening. *Matter of J-J*, 21 I&N Dec. 976 (BIA 1997).

The respondent states in his motion that the Immigration Judge on remand issued a new order vacating the previous (b) (6) finding and granting him (b) (6). We conclude that this was not the case. The Immigration Judge's January 7, 2009, memorandum order granted the respondent (b) (6), but did not mention the (b) (6) application finding.¹

The respondent states in his motion that the Immigration Judge's (b) (6) application finding was made prior to the Board's decisions in *Matter of Y-L*, 24 I&N Dec. 151 (BIA 2007) [decided April 25, 2007], and *Matter of B-Y*, 25 I&N Dec. 236 (BIA 2010). While this is true, our December 20, 2007, decision was issued subsequent to *Matter of Y-L*, *supra*, and

¹ To make a more complete record for our review, we had transcripts prepared for the hearings on remand, which took place on September 25, 2008, November 21, 2008, and January 7, 2009. No mention of the (b) (6) application finding was made during any of these hearings. Because the hearings did not contain any material information on the issue before us, we did not serve the transcripts on the parties and provide a briefing schedule. The transcripts are, however, included in the record of proceeding.

we concluded that the Immigration Judge's (b) (6) finding comported with the requirements in *Matter of Y-L-* (BIA at 1-2).

We now conclude that the Immigration Judge's (b) (6) finding comports with the applicable requirements in *Matter of B-Y-*, *supra*. The Immigration Judge made explicit findings that the incredible aspects of the (b) (6) application were material and were deliberately fabricated. The Immigration Judge found that the dates of events in Haiti in the 2002 (b) (6) application were changed to 2001, even though the respondent was in the United States during all of 2001, to make it appear that the (b) (6) application filing on November 8, 2002, was within 1 year of his arrival in the United States (I.J. at 2-3, 9, 11-12; (b) (6) [part of Exh. 1]; Exh. 1B).

The Immigration Judge separately addressed the respondent's explanations for inconsistencies or discrepancies in the context of how they may have a bearing on the materiality and deliberateness requirements unique to the (b) (6) determination. The respondent explained that the preparer of the 2002 (b) (6) application changed the dates of actual events on his application. However, the respondent admitted that he testified to these dates in (b) (6) of 2002 before the (b) (6) after he was given the (b) (6) application warnings (I.J. at 9, 11-12). We conclude that the respondent does not present an exceptional situation which would warrant sua sponte reopening. *Matter of J-J-*, *supra*. The respondent is thus permanently ineligible for any benefits under the Immigration and Nationality Act (with the exception of course of (b) (6)). See (b) (6) (last sentence).

Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied as untimely.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

In re: (b) (6)

APR 11 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Troy N. Moslemi, Esquire

APPLICATION: Reopening

The Board entered its final administrative order in this case on September 25, 2007. In that decision, we upheld the Immigration Judge's finding that the respondent's (b) (6) claim was not credible. In the same decision, we denied the respondent's motion to remand. On January 27, 2016, the respondent filed the instant motion to reopen. The Department of Homeland Security has not responded to the motion, which will be denied.

While the respondent's motion to reopen is not numerically barred, it is untimely because it was filed almost 9 years after the Board's September 25, 2007, final administrative order. See Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent asserts that her motion falls within the exception to the time limits applicable to motions to reopen to reapply for (b) (6), as well as (b) (6).

"arising in the country of nationality." Section (b) (6) (BIA 2007) (noting that it is the alien's "heavy burden" to show that the proffered evidence is (b) (6), and supports a prima facie case for a grant of relief), *aff'd*, (b) (6) (2d Cir. 2008). For the reasons discussed below, the respondent has not demonstrated that she has met her burden in this regard.¹

The respondent, a native and citizen of the People's Republic of China, contends that reopening is warranted because she has (b) (6) United States, and she has (b) (6) of this and that she would be (b) (6) her return (Respondent's Motion to Reopen at unnumbered 1, 3, Attachment B). In support of her motion to reopen, the respondent has submitted a letter from her father indicating that she

¹ We note that the respondent has styled the instant motion as a motion to reopen and terminate. However, the respondent has not provided any meaningful basis to reopen and terminate these proceedings, and none is evident in the record.

(b) (6)

(b) (6), “requesting my daughter to (b) (6)” (Respondent’s Motion to Reopen, Attachment A). She also submitted the (b) (6), which vaguely states that, upon the respondent’s repatriation, she will “have to (b) (6) and be (b) (6) [sic.]” (Respondent’s Motion to Reopen, Attachment B). The respondent additionally presented copies of her (b) (6), the 2014 (b) (6) for China, and her affidavit (Respondent’s Motion to Reopen, Attachments B-E).

We conclude that the proffered evidence is insufficient to warrant reopening of these proceedings. As an initial matter, (b) (6) in the United States, standing alone, (b) (6) and does not (b) (6) in her country of nationality, such that the instant motion may be found to fall within the exception to the time limits for motions to reopen. See (b) (6) (2d. Cir. 2008) (holding that the existing legal system does not permit aliens who have been ordered removed “to disregard their removal orders and remain in the United States long enough to (b) (6) and initiate new proceedings via a new (b) (6) application”); *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (noting that “apparent gaming of the system in an effort to avoid [removal] is not tolerated by the existing regulatory scheme”).

Turning to the evidence submitted with the motion to reopen, the respondent’s father’s letter is not sufficiently reliable or persuasive to warrant reopening. It is unsworn and it appears to have been procured for the purposes of litigation (Motion to Reopen, Attachment A). See *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 214 (BIA 2010) (giving diminished weight to letters from relatives that were written by interested witnesses not subject to cross examination), *rev’d on other grounds*, *Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). The letter also references, albeit in passing, the respondent’s claimed (b) (6) in China, which we have already found to be not credible.

Likewise, the (b) (6) is also only entitled to minimal weight (Motion to Reopen, Attachment B). Although (b) (6) was not included. See (b) (6) (giving minimal weight to (b) (6) that failed to identify its authors and that were unauthenticated, as well as unsigned); see also *Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 342 (2d Cir.2006) (holding that the weight afforded to the applicant’s evidence in immigration proceedings lies largely within the discretion of the agency).

Moreover, this notice has not been authenticated pursuant to 8 C.F.R. § 1287.6 or by any other means. See *Matter of H-L-H- & Z-Y-Z-*, *supra*. We are particularly disinclined to attribute significance to an unauthenticated document where, as here, (1) it is only corroborated by an unsworn statement from the respondent’s father, and (2) the respondent has not successfully challenged the Immigration Judge’s and the Board’s conclusion that she was not a credible witness. See *Zheng v. Gonzales*, 500 F.3d 143, 146-47, 149 (2d Cir. 2007) (holding that the Board properly relied on the Immigration Judge’s underlying adverse credibility determination to reject his documentary evidence, including an unauthenticated notice, which was supported only

(b) (6)

by his spouse's affidavit, as insufficient to establish (b) (6); *see also Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007) (holding that under the doctrine of falsus in uno, falsus in omnibus, "a single instance of false testimony may (if attributable to the petitioner) infect the balance of the alien's uncorroborated or unauthenticated evidence").

Even assuming that the (b) (6) is genuine, it is insufficient on its face to demonstrate that the respondent may (b) (6), or that she may sustain other (b) (6), upon her repatriation. The letter does not establish that the respondent will be forcibly (b) (6). It also does not indicate the amount she would be (b) (6). *See* (b) (6) (2d Cir. 2002) (noting that (b) (6) if there is a (b) (6) of a (b) (6)).

Additionally, the (b) (6) for China, which the respondent has submitted with her motion, does not, by itself, demonstrate that the Chinese (b) (6) since the respondent's September 26, 2005, hearing before the Immigration Judge (Respondent's Motion to Reopen, Attachment E). *See* (b) (6) (stating that, in determining whether evidence accompanying a motion to reopen demonstrates a (b) (6) that would justify reopening, we compare the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below).

Based on the foregoing, we conclude that reopening under the exception to the time limitations on motions to reopen at section 240(c)(7)(C)(ii) of the Act is unwarranted. *See Matter of S Y G*, *supra*, at 258; 8 C.F.R. § 1003.2(c)(3)(ii). Further, we do not find an exceptional circumstance in this case that would warrant the exercise of our limited sua sponte authority. *See* 8 C.F.R. § 1003.2(a). Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Philadelphia, PA

Date: FEB 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Tatiana S. Aristova, Esquire

ON BEHALF OF DHS: Jean L. Celestin
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment of status; remand

The respondent, a native and citizen of Uzbekistan, appeals the Immigration Judge's June 4, 2014, decision denying his application for adjustment of status. See section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). During the pendency of the respondent's appeal, he filed a motion to remand, to which the Department of Homeland Security has not filed a response. The motion to remand will be granted.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's timely motion to remand this matter is based on a petition for alien relative (Form I-130) filed by his United States citizen wife, which was approved by the United States Citizenship and Immigration Services (USCIS) on November 18, 2015. Applicable regulations provide that a motion to remand filed with the Board during the pendency of an appeal "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. §§ 1003.2(c)(1), (c)(4). In addition, the regulations provide that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* Where an alien seeks to reopen in order to pursue a new application for relief, a showing of prima facie eligibility for the relief must also be made. *INS v. Abudu*, 485 U.S. 94, 104 (1988).

Although the Immigration Judge previously denied an application by the respondent for adjustment of status in an exercise of discretion (I.J. at 22-32), the approved Form I-130 and

adjustment application on which the present motion rest concern a different marriage with different equities about which no facts have been found. The Immigration Judge previously found no statutory bars to the respondent's prior adjustment application, and therefore we find the respondent has demonstrated his prima facie eligibility for the pending application (I.J. at 21). Accordingly, we will grant the respondent's motion and will remand the matter to the Immigration Judge for further proceedings consistent with this opinion. Given this result, we need not address the merits of the respondent's appeal.

ORDER: The motion to reopen is granted, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Kansas City, MO

Date:

OCT 15 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hena G. Mansori, Esquire

APPLICATION: Termination of proceedings

This case is before us pursuant to an (b) (6) 2014, order of the United States Court of Appeals for the Eighth Circuit granting the government's unopposed motion to remand the proceedings to the Board. The respondent has filed a supplemental brief on remand and has requested termination of these proceedings. The respondent's appeal will be sustained.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native of India, citizen of Tanzania, and a lawful permanent resident of the United States since 2008. By a Notice to Appear dated June 19, 2013, the respondent was charged with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony crime of violence as defined under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (Exh. 1). The removal charge was based on the respondent's 2012 conviction for aggravated battery in violation of Kansas Statutes (K.S.) section 21-3414(a)(2)(A).

On August 15, 2013, the Immigration Judge found the respondent to be removable as charged, and ineligible for relief from removal. On January 15, 2014, the Board dismissed the respondent's appeal of the Immigration Judge's decision. Subsequently, the respondent filed a motion to reconsider which was denied by the Board.

In its motion before the court of appeals, the government requested a remand "for the Board to reconsider if a conviction under section 21-3414(a)(2)(A) of the Kansas statutes required proof of intentional or reckless conduct, and any other relevant issues."

Upon our de novo review, we find that the Department of Homeland Security (DHS) has not met its burden of proving by clear and convincing evidence that the respondent is removable as charged for having been convicted of an aggravated felony crime of violence as defined under section 101(a)(43)(F) of the Act. See section 240(c)(3)(A) of the Act.

The Immigration Judge determined, under a modified categorical analysis, that the respondent pleaded guilty to and was convicted of aggravated battery in violation of K.S. section 21-3414(a)(2)(A) (Exhs. 2a, 4f). Neither party disputes this finding.

Section 101(a)(43)(F) of the Act includes in the definition of an aggravated felony "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment (is) at least 1 year." See *Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997).

Under 18 U.S.C. § 16(a), an offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See also *Matter of Velasquez*, 25 I&N Dec. 278, 283 (BIA 2010) (physical force must be the intentional use of violent force that is capable of causing physical pain or injury to another person).

Under 18 U.S.C. § 16(b), a crime of violence includes "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The substantial risk referred to in § 16(b) "relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

The respondent's conviction is not categorically an aggravated felony crime of violence under 18 U.S.C. §§ 16(a) or (b). K.S. section 21-3414(a)(2)(A), the statute under which the respondent was convicted, defines an aggravated battery offense as "recklessly causing great bodily harm to another person or disfigurement of another person." An offense under K.S. 21-3414(a)(2)(A) is a felony under Kansas and federal law.

As defined in K.S. section 21-3201(c) reckless conduct is in relevant part "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." Additionally, the reckless requirement of reckless aggravated battery does not require a specific state of mind; instead, K.S. section 21-3201 only requires that a person take an unjustifiable risk which results in a harmful touching to the person of another. *State v. Spicer*, 30 Kan. App. 2d 317, 324 (2002).

The Eighth Circuit has found that reckless offenses cannot be crimes of violence under 18 U.S.C. § 16. See *United States v. Torres-Villalobos*, 487 F.3d 607, 615-16 (8th Cir. 2007); see also *United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) (stating that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the "use" of physical force requirement of 18 U.S.C. § 16).

Because the statute under which the respondent was convicted requires the offense to have been committed recklessly, a violation of K.S.A. 21-3414(a)(2)(A) is categorically not a crime of violence within the meaning of section 101(a)(43)(F) of the Act. Therefore, the DHS has not met its burden to establish by clear and convincing evidence that the respondent is removable as

charged under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony crime of violence. *See* section 240(c)(3)(A) of the Act.

Accordingly, the following orders will be entered.

ORDER: Upon reconsideration, this Board's January 15, 2014, decision is vacated, and the respondent's appeal is sustained.

FURTHER ORDER: The respondent's removal proceedings are terminated.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Charlotte, NC

Date:

OCT 23 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jeremy L. McKinney, Esquire

ON BEHALF OF DHS: Susan Lecker
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on May 22, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision denying her application for a waiver of the joint petition requirement under section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1186(c)(4)(B). On August 3, 2015, the respondent filed a timely motion to reopen to pursue adjustment of status based on a pending visa petition filed by her United States citizen husband. The Department of Homeland Security (DHS) opposes the respondent's motion. The respondent's motion to reopen will be denied.

The respondent is a native and citizen of the Philippines. In her motion, she claims that her United States citizen husband has filed a visa petition on her behalf and she seeks reopening to pursue adjustment of status on the basis of this petition. She argues that she meets the requirements for reopening set forth in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002) and that there is no substantial evidence of marriage fraud in her case.

The DHS, on the other hand, maintains that the respondent is statutorily ineligible for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a), because she was admitted to the United States as a K-1 nonimmigrant and can only adjust status through the provisions of section 216 and on the basis of a marriage to the United States citizen who filed the K visa on her behalf. See section 245(d) of the Act; 8 C.F.R. § 1245.1(c)(6).

We agree with the DHS. The respondent was admitted to the United States as a K-1 nonimmigrant on March 8, 2006. She subsequently married the United States citizen who petitioned for her and obtained conditional resident status.¹ The respondent and her husband

¹ It appears that, when the respondent applied for adjustment of status under section 216 on the basis of her marriage to the United States citizen who filed the K visa on her behalf, she received, in error, a lawful permanent resident card that was valid for 10 years instead of a conditional card valid for 2 years. The record, however, shows that the respondent did receive notice from the DHS, at the end of her conditional period was approaching, that she needed to file a joint petition to remove the conditional basis of her permanent resident status. The respondent further
(continued...)

divorced before the conditions on her status were removed, and the respondent subsequently sought a waiver of the requirement to file a joint petition to remove the conditions of her status. The DHS, and then an Immigration Judge, denied the waiver and terminated the respondent's conditional permanent resident status. The respondent now seeks to adjust her status under section 245(a) of the Act based on a marriage to another United States citizen.

Section 245(d) of the Act states that the "Attorney General may not adjust, [under section 245(a) of the Act], the status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant . . . to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K)." The pertinent regulations, in turn, confirm that an alien admitted to the United States as a K-1 nonimmigrant may only adjust status on the basis of a marriage entered into with the individual who filed the K visa petition and under section 216 of the Act. 8 C.F.R. § 1245.1(c)(6). Accordingly, the respondent is statutorily ineligible for adjustment of status under section 245(a) of the Act. *See Markovski v. Gonzales*, 486 F.3d 108 (4th Cir. 2007); *Matter of Sesay*, 25 I&N Dec. 431, 433 (BIA 2011); *see also Caraballo-Tavera v. Holder*, 683 F.3d 49 (4th Cir. 2012). We therefore deny the respondent's motion to reopen to pursue this form of relief.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

(...continued)

admitted to the allegation in the Notice to Appear that, on October 3, 2006, her status was adjusted to that of a permanent resident on a conditional basis. Accordingly, there is no dispute that the respondent's prior adjustment was pursuant to section 216 of the Act.

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date: SEP 24 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Garoon Gharakhanian, Esquire

ON BEHALF OF DHS: Zina Spektor
Assistant Chief Counsel

APPLICATION: Reopening

The respondent's motion to reopen is untimely. The Board entered the final administrative order in this case on June 20, 2005, when we affirmed without opinion the Immigration Judge's denial of his applications for (b) (6)

(b) (6).¹ A motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision, and only one may be filed. Sections 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) & (C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent filed the present motion and request for a stay of removal on July 9, 2015, over 10 years after the Board's final decision. The Department of Homeland Security ("DHS") has filed a brief in opposition to the motion. The motion and stay will be denied.

The respondent urges that the time and number limits should be equitably tolled with regard to his motion because he was the victim of ineffective assistance of counsel. The time and number limits for motions to reopen may be equitably tolled where an alien raises a claim of ineffective assistance of counsel. *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). An alien must, however, demonstrate that he or she has been prejudiced by counsel's conduct. *Id.*; *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (finding that prejudice must be shown for a due process challenge and that prejudice is found when the performance of counsel was so inadequate that it may have affected outcome); *see also Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (an alien can show prejudice where counsel's performance "may have affected the outcome of the proceedings"). The degree of negligence that must be established for ineffectiveness is that counsel's representation was so egregious that it rendered the hearing unfair. *See Matter of B-B-*, 22 I&N Dec. 309 (BIA 1998).

In this case, the respondent has not established due diligence or prejudice. Even assuming the veracity of the respondent's claim that he did not definitively learn of his prior counsel's

¹ The United States Court of Appeals for the Ninth Circuit denied the respondent's petition for review on (b) (6) 2006 (*Motion at Exh. H*).

ineffectiveness until he consulted with Attorney Sarian, he has not adequately established that he preserved his rights from the time he learned of the United States Court of Appeals dismissal of his petition for review on (b) (6), 2006, and the filing of the current motion in 2015. While the respondent asserts that he consulted with many attorneys during this time period, he has produced no evidence that he took any steps to preserve his rights between November 2006 and July 2015, when he filed the current motion (*Motion* at 33; Exhs. A, H). Given the respondent's substantial delay in consulting with and obtaining his current counsel, and the lack of evidence regarding steps he took to preserve his rights between the adverse decisions of the Ninth Circuit and the current motion, we find that the respondent did not act with due diligence. See *Avagyan v. Holder*, 646 F.3d 672, 680-81 (9th Cir. 2011) (no due diligence shown where, following the Board's denial of an asylum appeal, the alien took no affirmative steps to investigate whether the asylum claim had been adequately prepared); cf. *Ghahremani v. Gonzales*, 498 F.3d 993, 1000 (9th Cir. 2007) (due diligence shown in light of the alien's "unbroken efforts to retain competent counsel" during the relevant time period).

Furthermore, the respondent has not shown that he was prejudiced by prior counsel's representation on appeal where the arguments presented still do not establish (b) (6)

enumerated in the Act. See section (b) (6) of the Act, (b) (6). The respondent still has not shown that (b) (6)

(b) (6) the respondent rather than being the (b) (6) or "directed at the legitimate goal of finding evidence of crime." See (b) (6) (9th Cir. 2004). Consequently, the respondent has not demonstrated that the outcome might have been affected by his prior counsel

Finally, the respondent's motion does not demonstrate an exceptional situation that would warrant the exercise of our discretionary authority to reopen his proceedings sua sponte.² 8 C.F.R. § 1003.2(a); see *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "the power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent regulations, where enforcing them might result in hardship"). Accordingly, the following orders will be entered.

ORDER: The respondent's motion to reopen is denied as untimely.

FURTHER ORDER: The request for a stay of removal is denied as moot.



FOR THE BOARD

² The respondent requests in the alternative that the Board reopen and reinstate his appeal. However, the Board considered the new appellate brief submitted with this motion and we see no reason to reopen and reinstate the appeal where it is unlikely to change the result.

Falls Church, Virginia 22041

Files: (b) (6) -- Miami, Florida
(b) (6)

Date: SEP - 3 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Teresa Martinez-Cabanas, Esquire

APPLICATION: Reopening

The proceedings in this matter were last before the Board on July 19, 2013, at which time a previous motion to reopen filed by the respondents was denied. On May 15, 2015, the respondents filed a motion to reopen proceedings based upon (b) (6). The Department of Homeland Security has not responded to the motion.

The respondents' motion to reopen is untimely filed, but they urge that the motion should be found to fall within the exception to the time limits for motions to reopen to reapply for (b) (6) or (b) (6) in the country of nationality. See section (b) (6). The respondents have proffered evidence of (b) (6) in Venezuela since their case was last before the Immigration Judge. Specifically, the respondents have offered evidence indicating that, in response to (b) (6) in this country, the president of Venezuela requested that the (b) (6). The evidence suggests that this was then done by the president of the national assembly. The respondents have submitted news articles relating to (b) (6) and an electronic copy of the broadcast purporting to name and show the image of respondent (b) (6).

We make no comment on the ultimate outcome of this case, but find that the respondents have presented sufficient evidence of events in Venezuela relevant to their claim so as to warrant reopening of the proceedings for further evaluation of the evidence and its effect on the respondents' claims. See *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). Accordingly, the motion to reopen will be granted, and the record will be remanded for a new hearing.

ORDER: The motion to reopen is granted and the record is remanded to the Immigration Court for further proceedings not inconsistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Salt Lake City, UT

Date:

OCT 26 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elisabeth M. W. Trefonas, Esquire

APPLICATION: Reopening, administrative closure

This case was last before us on April 6, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The respondent now has filed a timely motion to reopen and administratively close his proceedings on the ground that his application for consideration for (b) (6) has been approved. The Department of Homeland Security (DHS) has not responded to the respondent's motion. The respondent's motion to reopen will be denied.

Administrative closure is a tool used to regulate proceedings, that is, to manage an Immigration Judge's calendar or to manage the Board's docket. *See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). Administrative closure temporarily removes a case from a calendar or docket and does not result in a final order. *See id.* In the matter before us, there is already a final order, and there is nothing on the Board's docket to manage. Furthermore, the relief the respondent has obtained is administered solely by the DHS and does not require that proceedings be reopened. The relief is separate and apart from removal proceedings. We therefore conclude that administrative closure is not appropriate in this matter. Accordingly, we deny the respondent's motion to reopen.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

JUN - 3 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jay Ho Lee, Esquire

The Board issued a final order in this case on February 28, 2006. We affirmed an Immigration Judge's decision denying (b) (6). The respondent, a (b) (6)-year-old native and citizen of China, filed an untimely motion to reopen ten years later, on February 16, 2016. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). The motion to reopen, to which the Department of Homeland Security (DHS) has not responded, will be denied.

The Immigration Judge, as affirmed by the Board, found that the respondent's testimony was not credible. That is, the respondent was not truthful when he was first interviewed by immigration authorities, and falsely told officials on two occasions that (b) (6) (I.J. at 9). The respondent also told officials that the (b) (6) his mother (b) (6), but later admitted that this was not truthful. *Id.* The Immigration Judge moreover found it speculative that the respondent, then (b) (6). *Id.* at 10. The respondent also presented insufficient evidence that he would (b) (6). *Id.* at 11-12.

The respondent brings a claim of ineffective assistance of counsel against attorney Andre R. Sobolevsky, who earlier represented him before the Board, and who has been suspended from practice before the Board and Immigration Courts.

Even aside from the lateness of the motion with regard to its claim of ineffective assistance of counsel, the motion would be denied. That is, the respondent fails to show prejudice resulting from claimed ineffective assistance of counsel. *Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010). The respondent blames Sobolevsky for not filing a brief with this Board (Respondent's Mot. at 2; Respondent's Aff.). He also faults the former attorney for claiming that the respondent was a (b) (6), on the Notice of Appeal. *Id.* The respondent does not explain, however, how the Immigration Judge erred in denying relief. In particular, the respondent does not show any error in the Immigration Judge's adverse credibility determination.

(b) (6)

The pending motion also argues that the respondent has evidence of (b) (6) in China (Respondent's Mot. at 2-4). The time limit for motions to reopen does not apply if it is "... based on (b) (6) arising in the country of nationality. . . if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." Section (b) (6) of the Act; (b) (6). The motion must state the new facts to be proved and must be supported by evidentiary material. (b) (6) (2d Cir. 2008) (explaining that it is the alien's heavy burden to show that the proffered evidence is material, (b) (6), and supports a prima facie case for a grant of (b) (6)); (b) (6) (BIA 2013).

The proffered evidence, including a "supplementary document", does not establish prima facie eligibility for (b) (6) in China.

The respondent seeks reopening based on (b) (6) sometime after meeting his wife in 2008, and (b) (6), 2010. He argues that if he returns to China, he is (b) (6) because China's (b) (6) (Respondent's Mot. at 2-4; Respondent's Aff). He has attached a statement from (b) (6) application, an affidavit, his (b) (6), background evidence from recent years, and Department of State country reports concerning China.

The respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act and 8 C.F.R. § 1003.2(c)(3)(ii). (b) (6) in the United States constitutes (b) (6) in the United States rather than (b) (6) in China. See (b) (6) (2d Cir. 2006) ("[a] self-induced (b) (6) cannot suffice"); (b) (6) (2d Cir. 2005) (a (b) (6) in the United States does not amount to an exception to the statutory and regulatory time bar for motions to reopen).

The respondent claims that he (b) (6). However, the respondent has not provided sufficient evidence that (b) (6) in the United States or are likely to become aware of them. See (b) (6) (2d Cir. 2009); (b) (6) (2d Cir. 2008).

The background evidence attached to the motion does not demonstrate (b) (6). The State Department Country Reports for 2006, 2003, and 2002, attached to the motion, demonstrate that China has had a (b) (6) (Exh. C-9, 2006 Country Report at pp. 1, 14-17; Exh. C-10, 2002 Country Report at pp. 2, 14-18; Exh. C-11, 2001 Country Report), and that (b) (6) always exists but varies from year to year.

(b) (6)

The respondent cites excerpts from the State Department Country Reports indicating that (b) (6) somewhat in the Fujian Province, but has since increased. The respondent cites to the 2001 and 2002 Country Reports, Exhs. C-10 and C-11. However, China has long had (b) (6). See Removal Hearing Exh. 9, June 2004 Department of State China Profile, at pp. 3-10. Since the respondent has not demonstrated (b) (6) claim, he has not shown that an exception to the time limitation on a motion to reopen applies.

As the respondent has not shown that reopening is warranted in this matter, the pending motion will be denied.

ORDER: The respondent's motion to reopen is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Memphis, TN

Date:

In re: (b) (6)

APR 19 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Robert A. Free, Esquire

APPLICATION: Reconsideration; reopening

This case was last before the Board on June 22, 2015, when we denied the respondent's untimely motion to reopen based on ineffectiveness of counsel. On August 5, 2015, the respondent filed this untimely motion asking the Board to reopen his proceedings sua sponte based on changes in law that may affect his eligibility for relief. The Department of Homeland Security ("DHS") has not responded to the motion, which will be granted. 8 C.F.R. § 1003.2(g)(3).

The respondent requests that the Board reopen the proceedings sua sponte based upon changes in the law as reflected in *Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015), an intervening precedent pertaining to the "stop time" rule for purposes of cancellation of removal as it relates to the filing or non-filing of the Notice to Appear ("NTA") in removal proceedings. The Board has held that where there is a change in law relevant to an alien's proceedings, we may exercise our authority to reopen proceedings sua sponte. 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). As the respondent has presented evidence of a change in law that may impact his eligibility for relief, we will grant the motion. On remand, the Immigration Judge may receive any additional evidence she deems appropriate to the full resolution of this matter. See 8 C.F.R. §§ 1003.30 and 1240.10(e).

ORDER: The motion to reopen is granted and the record is remanded to the Immigration Judge for further proceedings not inconsistent with this order and entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, California

Date:

OCT 30 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Douglas G. Ingraham, Esquire

APPLICATION: Reissuance

The respondent has filed a motion to reissue the Board's January 31, 2013, decision in these proceedings. The respondent seeks reissuance on the basis of the failure of counsel to update address information for both counsel and the respondent. The Department of Homeland Security has not responded to the motion. The motion will be denied.

In general, we will reissue a decision where some administrative error at the Board has resulted in a defect of service which, if not corrected, would prevent a party from perfecting a timely appeal or complying with a voluntary departure deadline. However, in these proceedings, the decision of the Board was mailed both to the respondent and to counsel at the addresses that they provided. We have recognized that "[a] letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee." See *Matter of M-R-A-* 24 I&N Dec. 665 (BIA 2008) citing *Matter of M-D-*, 23 I&N Dec. 540, 546 (BIA 2002)(quoting *Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1137 n.6 (4th Cir. 1984)). Absent evidence to the contrary, even having considered the affidavit submitted by counsel, we find no basis upon which to reissue our decision of January 31, 2013.

Accordingly, the following order will be entered.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Philadelphia, PA

Date: FEB 25 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Marcia B. Ibrahim, Esquire

ON BEHALF OF DHS: Jeffrey Forrest Boyles
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on March 26, 2009, when we dismissed the respondent's appeal. On November 17, 2015, almost more than 5½ years after the Board's order, the respondent filed a motion to reopen. The Department of Homeland Security (DHS) has opposed the motion. The motion will be denied.

The respondent's motion is untimely, as it was not filed within 90 days of the Board's final administrative decision. Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, argues that his proceedings should be reopened based on "(b) (6)" within the meaning of section (b) (6), which sets forth an exception to the (b) (6) applications. See also (b) (6). Specifically, the respondent argues that, after he was detained by the DHS in October 2015 and as a result of such detention, he has (b) (6), and (b) (6) in Guatemala in 2004 was actually (b) (6) (Motion, at 3-6). He argues that he could not present the evidence of his (b) (6) at his 2008 hearing because he was not (b) (6) (Motion, at 5). He therefore argues that his proceedings should be reopened and remanded to allow him to reapply for (b) (6). In support of the motion, the respondent submitted his statement, a statement by his former girlfriend (who is also the mother of his child), a new (b) (6) application, and a number of articles and reports regarding (b) (6) Guatemala.

However, the respondent has not argued or shown that his motion falls within the exception to the time limitations for motions to reopen to apply or reapply for (b) (6) in the country of nationality. Section (b) (6). Although the respondent argues, as noted above, that the (b) (6) for purposes of the (b) (6), he has not argued or shown that this also constitutes a (b) (6) Guatemala, such that his motion falls within an exception to the motion to reopen time limitations. Section

(b) (6)

240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The respondent's discovery of his (b) (6) is essentially a (b) (6) in the United States, rather than a (b) (6) in Guatemala. (b) (6) (2d Cir. 2006). Therefore, this change would not cause his motion to fall within an exception to the motion to reopen time limitations, and would not provide a basis for a successive (b) (6) claim. (b) (6) (BIA 2007).

Furthermore, the evidence submitted by the respondent does not establish (b) (6)

. The evidence submitted shows (b) (6) (Motion Exhs. F-M). Nevertheless, the evidence submitted, along with other evidence in the record, shows that these are the continuation of the same or similar conditions that existed at the time of the respondent's 2008 hearing, rather (b) (6) (Motion Exh. L; Exh. 7). Since the respondent did not show (b) (6) in Guatemala material to his (b) (6) claims, the motion will be denied as untimely.

In addition, we note that the respondent has not shown that (b) (6) supported by "new evidence" that was not available and could not have been discovered or presented at the previous hearing. Section 240(c)(7)(B) of the Act; 8 C.F.R. § 1003.2(c)(1). Although the motion claims that the respondent's (b) (6) could not be presented at his 2008 hearing because (b) (6) (Motion, at 5), the respondent's statement submitted with the motion states that while in Guatemala he had (b) (6) (Motion Exh. C, at 29).¹

The respondent also urges us to sua sponte reopen his proceedings under 8 C.F.R. § 1003.2(a). We do not find that the respondent's case presents an exceptional situation that would warrant the Board's exercise of its discretion to reopen sua sponte. *Matter of J-J-*,

¹ Furthermore, although the motion claims that the respondent became (b) (6) only after he became detained by the DHS in October 2015, the respondent's statement claims that "[a]pproximately three years ago, I met (b) (6) whom I have an (b) (6)" (Motion Exh. C, at 30).

We also note that the respondent's and his former girlfriend's statements are entitled "affidavits," but they were not sworn to by the individuals before an officer authorized to administer oaths (Motion Exhs. C-D); therefore, they do not qualify as affidavits. See Black's Law Dictionary (9th Edition 2009) (defining affidavit as a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths"). In fact, these statements were not even signed by anyone, and the respondent's motion offers no explanations on how these documents were prepared or why they could not be signed by anyone. Based on the above, we give limited weight to these statements. In any event, even if we were to review the contents of these statements, they would not support the arguments presented in the motion as discussed above.

21 I&N Dec. 976 (BIA 1997). Accordingly, the respondent's motion will be denied. The motion for stay of removal is denied as moot.

ORDER: The motion to reopen is denied.

A handwritten signature in black ink, appearing to be 'M' followed by a horizontal line.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: MAR 16 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Ioulia S. Maslikova
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on January 26, 2012, when we entered a final administrative order dismissing the respondent's appeal. On December 7, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security opposes the motion. The motion has been filed out of time, and it will be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See (b) (6) (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. She applied for (b) (6) in China. The Immigration Judge found that she was not credible. The respondent seeks reopening to apply for (b) (6) in China.

She states that she (b) (6) in the United States since 2013. See Exhibit C at 1. She claims that (b) (6) 2014, she (b) (6), in China, and that (b) (6). *Id.* at 2. She relates that (b) (6). *Id.* The respondent reports that she

(b) (6)

(b) (6) in the United States on (b) (6), 2015, and (b) (6) and give (b) (6) to the Chinese people. *Id.* at 1-2. She claims that the Chinese (b) (6), and that she was told that (b) (6). *Id.* at 2. She states that if she returned, she must (b) (6). *Id.* She declares that the Chinese (b) (6). *Id.*

The respondent offers her (b) (6) application, her statement, photographs, registered mail receipts dated (b) (6), 2014, an advertisement and ticket to a 2015 (b) (6) and a (b) (6), a letter, identity card, and mailing receipt from (b) (6) who claims to be a friend of (b) (6), and the 2014 (b) (6).

The DHS asserts that it was after the respondent's appeal was dismissed and her petition for review by the United States Court of Appeals for the Ninth Circuit was denied that she first raised her claim that she (b) (6) China and (b) (6) to China. *See* DHS brief at 1. The DHS contends that after the respondent and her family allegedly (b) (6), the respondent's daughter was permitted to come to the United States on a student visa on (b) (6), 2015. *Id.*

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Zhao v. Holder*, 728 F.3d 1144 (9th Cir. 2013); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868-69 (9th Cir. 2003). We will deny the respondent's motion because she has not (b) (6) in China to warrant an exception to the time limit for motions to reopen, and she has not established her prima facie eligibility for relief. *See* (b) (6) (9th Cir. 2009) (a motion to reopen (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

The evidence regarding (b) (6) in China is not sufficient to demonstrate a (b) (6) since the time of the respondent's hearing in 2010. The evidence reflects that (b) (6), but the (b) (6) are reserved for (b) (6) rather than (b) (6). *See, e.g.,* (b) (6) at 1-3, 5, 8, 11-13, 19-20. It indicates that the (b) (6) in China has been a concern for many years, including the time of the respondent's 2010 proceedings. *Id.* The respondent states that the Chinese (b) (6). *See* Exhibit C at 2. We conclude that the evidence is inadequate to show a (b) (6) in China with respect to (b) (6). *See generally* (b) (6) (9th Cir. 2014) (an untimely motion to reopen based on a

(b) (6)

(b) (6) must be supported by evidence of (b) (6).)

The respondent has not offered evidence for her claim that she (b) (6) in China prior to her departure in 2002. See Exhibit C at 1. She stated in her 2004 and 2009 (b) (6) applications that she did (b) (6) in her home country. See Exhibit 2A at 6; Exhibit 9A at 6. She did not mention that she had (b) (6) in her 2010 proceedings. We conclude that the respondent's prior representations cast doubt on her newly made unsupported declaration that she (b) (6) in China.

We give limited weight to the documents that purport to be a (b) (6) from the (b) (6). See Exhibits E, F. These documents indicate that in 2014, (b) (6). However, they have not been authenticated in any manner, are largely handwritten, and one is unsigned by any individual or official. *Id.* More importantly, there is no mention of the respondent in these documents, and the respondent has not provided a statement from (b) (6) to support the respondent's claim that these (b) (6) to China. See Exhibits C, E, F.

We give no weight to the letter that the respondent offers from her friend's friend, (b) (6), who claims that during (b) (6) told the (b) (6) with the respondent, after which (b) (6). See Exhibit D. However, there is no statement from (b) (6), or other evidence for these claims. This is an unsworn statement that appears to be created for the purpose of litigation and is from an interested witness not subject to cross-examination. *Id.* It is of essentially unknown reliability, and given the respondent's previous lack of candor, we do not find that it has been shown to be of sufficient evidentiary worth to support reopening these proceedings.

The respondent has not provided a statement from any family member in China to support her claim that the (b) (6). See Exhibit C at 2. She has not offered (b) (6), any official document naming her, or evidence that (b) (6). The statement of the DHS that the respondent's daughter was able to travel to the United States on an approved student visa in 2015 undermines the respondent's claim that the (b) (6). See DHS brief at 1; Exhibit C at 2. The evidence is inadequate to support the respondent's claim that the (b) (6) her and her family. See (b) (6) (9th Cir. 2008) (clear evidence that the (b) (6) the respondent as a (b) (6) the respondent's movements); (b) (6) (9th Cir. 2006) (evidence of a (b) (6) the respondent); (b) (6) (9th Cir. 2004) (evidence that the (b) (6) the

(b) (6)

(b) (6) and have demonstrated (b) (6) him and his family). We conclude that the respondent has not met her burden of proof to establish her eligibility for the requested relief to warrant reopening. *See Zhao v. Holder, supra; Mendez-Gutierrez v. Ashcroft, supra.* The evidence indicates that that Chinese (b) (6) in the United States may be (b) (6) upon their return, but it is not sufficient to prima facie demonstrate that the respondent in this case has (b) (6) amounting (b) (6) in the United States because it does not demonstrate a (b) (6). *See, e.g., (b) (6)* at 1-3, 5, 8, 11-13, 19-20.

The respondent has not made a prima facie showing that (b) (6)

upon her return because her evidence does not indicate a (b) (6). *See (b) (6)*.

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. Her evidence is not sufficient to establish a (b) (6) arising in the country of nationality" so as to create an exception to the time and number limitations for filing a late motion to reopen to apply for (b) (6). *See (b) (6)*. The respondent has not met her burden of proving that her removal proceedings should be reopened. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the motion exceeds the time limit for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JAN 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Areg Kazaryan, Esquire

APPLICATION: Reopening, (b) (6)

This case was last before us on April 9, 2010, when we dismissed the respondent's appeal from an Immigration Judge's decision denying her applications for (b) (6). On October 6, 2015, the respondent filed a motion to reopen. Although she has not stated the specific form or forms of relief she is seeking upon reopening, she appears to be requesting to reapply for (b) (6) in Guatemala. The respondent's motion to reopen will be denied.

Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i), states that motions to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." We entered the final administrative order of removal in the respondent's case on April 9, 2010. The respondent, however, did not file her motion to reopen until more than 5 years later. The respondent's motion to reopen therefore is untimely.

The deadline for filing a motion to reopen does not apply to motions to reopen to apply or reapply for (b) (6).

The respondent appears to claim that her motion fits within this exception. The respondent, however, has not met her burden of showing that (b) (6) in Guatemala have (b) (6) appreciably since her final hearing before the Immigration Judge in 2008. Cf. (b) (6) (9th Cir. 2004) (finding (b) (6) in general and the respondent's (b) (6)).

First, the respondent has not provided evidence that conditions specific to her or to her family remaining in Guatemala have changed since 2008. In addition, the respondent has not shown a (b) (6) in her homeland. The respondent has submitted numerous articles regarding the (b) (6) in Guatemala, and she argues that (b) (6) increased substantially in recent years. The articles and reports the respondent has submitted, and the information already in the record, however, do not establish that there has been a (b) (6) since 2008. Compare Exhibits to Respondent's Motion to Reopen, pages 1-86 to Exhibit 3 (2007 Country Report on Human Rights Practices in Guatemala) and Exhibits to Respondent's (b) (6) Application.

An article from Reuters News Service dated November 25, 2013, states that (b) (6) is on the rise in Guatemala, but the statistics show (b) (6) in 2009 (b) (6) and (b) (6) in 2013 (b) (6). See pages 5-16, 17, and 33 of Attachments to Respondent's Motion to Reopen. Several articles state that (b) (6) for decades in Guatemala and represents a continuation of practices that emerged during the country's civil war. See pages 22-27, 30-32 of Attachments to Respondent's Motion to Reopen. One article indicates that a general (b) (6) began in 2002 and 2003 and continued through 2008 when the government began to take (b) (6). See 19-21. The article indicates that the government's steps have not stemmed the tide of (b) (6). *Id.* The current situation instead appears similar to the conditions discussed in the 2007 Country Report on Human Rights Practices, included as Exhibit 3 in the record, and a Human Rights Watch Report and an Amnesty International article attached to the respondent's original (b) (6) application. Given these facts, the respondent has not met her burden of showing that there has been a (b) (6) in Guatemala since 2008.

Further, even if we were to find that (b) (6) in Guatemala has (b) (6) since 2008 to (b) (6), the respondent has not presented enough evidence to establish that she is prima facie eligible for (b) (6) or (b) (6). See (b) (6) (9th Cir. 2008) (stating that, to prevail on a motion to reopen based on (b) (6), an applicant must show that her evidence establishes prima facie eligibility for relief); (b) (6), *supra* (stating that the critical question in a motion to reopen is whether (b) (6) sufficiently that an individual who did not previously have a legitimate claim for (b) (6) now has (b) (6)).

The respondent claims to (b) (6), but she has not identified (b) (6) herself. She also has not submitted evidence to show that (b) (6). The background evidence she has provided regarding (b) (6) in her homeland is not sufficient to meet her burden of showing that she has (b) (6) if returned. (b) (6) are not sufficient, on their own, to establish (b) (6) the respondent has identified is carried out by a wide variety of actors for a wide variety of reasons. We therefore cannot conclude that the respondent has met her burden of establishing that she is prima facie eligible for (b) (6).

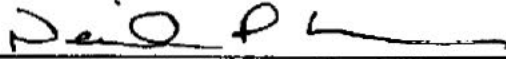
In addition, the respondent has not submitted a new (b) (6) application. Her prior (b) (6) claim was based on (b) (6).¹ The respondent therefore should have submitted a new

¹ The respondent claims in her current motion that she raised (b) (6) during her prior proceedings, but neither her (b) (6) application nor her testimony raised this point.

application to support her motion to reopen. *See* 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen for the purpose of submitting an application for relief must be accompanied by the appropriate application and all supporting documents).

Based on the foregoing, we deny the respondent's motion to reopen.

ORDER: The respondent's motion to reopen is denied.

A handwritten signature in black ink, appearing to read "Dei P L", is written over a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date:

In re: (b) (6)

APR - 5 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Inna Lipkin, Esquire

ON BEHALF OF DHS: J. Mark Kang
Assistant Chief Counsel

APPLICATION: Reopening

In a January 23, 2009, decision the Board sustained the Department of Homeland Security's (DHS) appeal, and found the respondent ineligible for (b) (6), but remanded proceedings for consideration of his requests for (b) (6) and voluntary departure. Following remand, the Board dismissed the respondent's appeal on March 24, 2011, but remanded for further action with respect to the respondent's request for voluntary departure. On December 11, 2012, the Board dismissed the respondent's appeal of the Immigration Judge's decision relating to voluntary departure. On November 8, 2013, the Board reissued the March 24, 2011, decision with specified modifications. The respondent filed a motion to reopen proceedings on December 9, 2015, also seeking a stay of removal, which the DHS opposes. The motion will be denied.

The respondent's motion is both time and number-barred. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). However, he avers that reopening is warranted in light of (b) (6) in his native Indonesia. Specifically, he states that he (b) (6) if he is returned to Indonesia because he (b) (6) (Statement). We observe that there is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under section (b) (6) or (b) (6) of the Act and is based (b) (6) arising in the country of nationality, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). In order to support reopening, the respondent must also establish prima facie eligibility for the relief sought. *INS v. Abudu*, 485 U.S. 94 (1988); *Reyes v. INS*, 673 F.2d 1087, 1089 (9th Cir. 1982). The respondent has not satisfied his burden of proof in this regard.

We initially observe that respondent's counsel also alleges in the motion that the respondent (b) (6) in Indonesia related to his (b) (6) (Motion at 10). However, statements by counsel in a motion are not evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In his (b) (6) application the respondent did select the (b) (6) in citing the bases on which he is seeking (b) (6). However, when asked to explain in detail his claimed (b) (6) he referenced only his statement, which makes no mention of (b) (6) to his

(b) (6) Moreover, all of the documents submitted in support of the motion relate to religious issues in Indonesia, not (b) (6). As such, we shall address this claim no further.

The respondent's motion is deficient as he did not submit evidence of (b) (6) at the time of his 2009 hearing. As such, we are unable to determine whether a (b) (6) has occurred. See *Matter of S-Y-G-*, 24 I&N Dec. 247, 253 (BIA 2007) (providing that "[i]n determining whether evidence accompanying a motion to reopen demonstrates a (b) (6)s that would justify reopening, we compare the evidence of (b) (6) submitted with the motion to those that existed at the time of the merits hearing below"). In this regard, we note that the respondent's 2005 (b) (6) from (b) (6) which, without more, is insufficient to demonstrate a (b) (6) in Indonesia. See *Chandra v. Holder*, 751 F.3d 1034, 1037 (9th Cir. 2014). Moreover, as the respondent's (b) (6) occurred prior to his hearing it, alone, is not "new" for purposes of reopening. (b) (6) (BIA 1991); (b) (6) ■ ■ ■.

In addition, we observe that the respondent has not shown that the documents submitted with his motion (b) (6) as alleged. Rather, those documents largely relate to conditions in (b) (6), although the respondent is from (b) (6) (Motion at 9; (b) (6); Exhs. 1-4). None of these documents, moreover, reflect (b) (6) as alleged (Exhs. 1-8). Rather, there is a lack of evidence demonstrating a (b) (6) relating to the respondent's (b) (6).

In sum, we find that the respondent has not demonstrated that (b) (6) has occurred in Indonesia. As such, his motion is not exempt from the noted statutory bars, and neither reopening nor a stay of removal is warranted. Accordingly, the following order shall be entered.

ORDER: The motion is denied.


FOR THE BOARD

¹ We note that some of these documents are from obscure sources, and/or are of uncertain reliability, with one of them containing only a brief paragraph relating to (b) (6) in Indonesia (Exh. 6-7). Another document is poorly copied, and partially illegible (Exh. 5). The Amnesty International report cites "(b) (6) in general, noting that (b) (6) (Exh. 7). A (b) (6) for purposes of exemption from the noted statutory bar. Moreover, the Department of State report states that (b) (6) declined (Exh. 8). Neither report reflects (b) (6) in the respondent's native North Sumatra Province.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

APR 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATIONS: Reopening; stay of removal

This case was last before us on December 26, 2007, when we entered a final administrative order dismissing the respondent's appeal. On October 16, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. She requests a stay of removal. The Department of Homeland Security has not responded to the motion. The motion has been filed out of time, and it will be denied. The respondent's stay request will also be denied.

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6) arising in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent, a native and citizen of China, applied for (b) (6). She seeks to have her proceedings reopened to apply for (b) (6) in China, (b) (6) the United States outside of marriage, (b) (6) in China. She asserts that her evidence demonstrates that "the Chinese (b) (6) ," and that "(b) (6) have increased in Respondent's region of China since her initial proceedings in 2006." See Motion at 1, 5, 16. She contends that reopening sua sponte is warranted.

She offers her asylum application, affidavit, (b) (6)

, letters, a driver's license,

(b) (6)

(b) (6) card, and an employment authorization card from relatives and a friend in the United States, a letter and identity card from her father in China, and photographs.

She also offers a portion of the 1982 Constitution of the People's Republic of China, the 2002 (b) (6) of the People's Republic of China, a portion of the 2005 Law of the People's Republic of China on Penalties for Administration of Public Security, a 2008 (b) (6) in China, an article of the Criminal Law of the People's Republic of China, a portion of the 2013 (b) (6) the 2014 Annual Report of the United States Commission on (b) (6) on China, a portion of the 2014 Country Report on China, a 2014 Report from the Immigration and (b) (6) Board of Canada, a portion of the 2014 Annual Report of the Congressional-Executive Commission on China (CECC), a portion of the transcript of a 2015 congressional hearing, research articles, and media reports.

The respondent relates that since 2014, she and her son have been (b) (6). See Respondent's affidavit, ¶¶ 5-6. She states that she was (b) (6) and (b) (6). *Id.*, ¶ 7. She declares that if she went to China, she will continue (b) (6). *Id.* She states that there is (b) (6) in China, that (b) (6) is (b) (6) and that she is (b) (6). *Id.* The respondent adds that she is also (b) (6) to China because she (b) (6), she will possibly be (b) (6). *Id.*, ¶ 8.

The instant case arises in the jurisdiction of the United States Court of Appeals for the Second Circuit, and we decline to apply the decisions that the respondent cites from outside of the Second Circuit. We will deny the respondent's motion because she has not demonstrated (b) (6) in China to warrant an exception to the time limit for motions to reopen, and she has not established her prima facie eligibility for relief. See (b) (6) (a motion to reopen based on (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief). Specifically, the evidence she offers regarding (b) (6) in China is not sufficient to demonstrate (b) (6) in China or (b) (6) since the time of her hearing in 2006.

The evidence reflects that China continues to (b) (6), although there have been reports of the (b) (6), or (b) (6). See, e.g., Exhibit 2(1) at 10-12; Exhibit 2(2) at 21-37; Exhibit 2(3) at 2, 6, 90-93, 95-99; Exhibit 2(4) at 61-64, 66, 70, 79-80, 82, 98; Exhibit 2(5) at 5, 39, 41, 47-49; Exhibit 6(3). It demonstrates that the (b) (6) differed in degree and varied significantly from region to region. *Id.*; see also Exhibit 4(1) at 223-224, 242; Exhibit 7(1)-(15). Further, the evidence indicates that (b) (6) has been a (b) (6) including at the time of the respondent's hearing in 2006. See, e.g., Exhibit 2(2) at 21-22; Exhibit 2(5) at 47 ("(b) (6) parameters). We conclude

(b) (6)

that the respondent's evidence is inadequate to show (b) (6) in China with respect to the (b) (6).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. *See Shao v. Mukasey, supra*. We find that evidence of the (b) (6) and varying degrees of (b) (6) in China is not sufficient to prima facie demonstrate that the respondent in this case has (b) (6) because it does not indicate a (b) (6) in China on (b) (6). *See* (b) (6) (2d Cir. 2008); (b) (6) (2d Cir. 2005). We conclude respondent has not met her burden to demonstrate that she is prima facie eligible for relief (b) (6).

Regarding the respondent's claim (b) (6) in China, we find that her evidence of (b) (6) in China (b) (6) is not sufficient to demonstrate (b) (6) since the time of her hearing in 2006. The evidence reflects that (b) (6) continue to be (b) (6). *See, e.g.,* Exhibit 2(3) at 6; Exhibit 2(4) at 62; Exhibit 2(6) at 125, 128-129, 132; Exhibit 3 at 207-213; Exhibit 5(1) at 265; Exhibit 5(2) at 271-273; Exhibit 8(1)-(9). It indicates that there have been modifications to (b) (6) in China if (b) (6) in China, and that the (b) (6) appears to be a continuation of a similar (b) (6) in effect since before the respondent's hearing in 2006. *See, e.g.,* Exhibit 2(6) at 125, 129; Exhibit 3 at 208-209. The evidence is not adequate to demonstrate (b) (6). *See* (b) (6) (BIA 2010), *rev'd in part*, (b) (6) (2d Cir. 2012); (b) (6).

The respondent is from (b) (6), Fujian Province. Her evidence does not suggest a recent campaign of (b) (6) in her locality. Rather, it reflects that the (b) (6) continues to be enforced in the Fujian Province in substantially the same manner since the time of the respondent's proceedings in 2006, and does not indicate that there has been (b) (6) in the respondent's home region. *See, e.g.,* Exhibit 2(3) at 3, 6; Exhibit 2(4) at 62; Exhibit 2(6) at 125, 129; Exhibit 3 at 208-210. The evidence reflects that (b) (6) for (b) (6), although there have been some reports of some (b) (6) in some areas of China contrary to the (b) (6). *See, e.g.,* Exhibit 2(3) at 6; Exhibit 2(4) at 62; Exhibit 2(6) at 125, 128-129, 132; Exhibit 3 at 207-213; Exhibit 5(1) at 265; Exhibit 5(2) at 271-273; Exhibit 8(1)-(9). However, none of the reports (b) (6) where (b) (6) who had (b) (6) the United States. *Id.* The respondent has not met her burden to demonstrate that she is prima facie eligible for (b) (6) in China because her evidence is not sufficient to establish that she will (b) (6) upon her return to China at this time based (b) (6) in the United States. *Id.*

(b) (6)

The respondent has not demonstrated that she would be (b) (6). See (b) (6) (BIA 2007) (a showing of (b) (6) may qualify as (b) (6) to (b) (6), but a showing of (b) (6) to (b) (6) where the record contains scant information concerning the applicant's (b) (6)). She has not offered information to establish her (b) (6) nor adequate evidence to demonstrate that she would (b) (6) in China. See (b) (6) (2d Cir. 2014) (discussing the circumstances under which (b) (6)).

The respondent has not made a prima facie showing that (b) (6) upon her return because her evidence does not indicate a (b) (6). See (b) (6).

We conclude that the respondent has not met the requirements of section 240(c)(7)(C)(ii) of the Act. Her evidence is not sufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time limit for filing a late motion to reopen to apply for (b) (6). See (b) (6) (2d Cir. 2005); (b) (6) (BIA 2006); (b) (6). She has not met her burden of proving that her removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). We find that an exercise of our sua sponte authority to reopen is not warranted. See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Accordingly, as the respondent's motion exceeds the time limit for motions to reopen, it will be denied, and her request for a stay of removal will also be denied.

ORDER: The respondent's motion to reopen and request for stay of removal are denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Baltimore, Maryland

Date:

SEP 18 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Nebiyou D. Tessema, Esquire

APPLICATION: Reopening

The respondent in this matter has filed a motion seeking to have these proceedings reopened based upon having (b) (6) in her native country. The evidence of record includes medical documentation verifying that the respondent has (b) (6). Based upon that evidence, and given the change in law since the case was last before the Immigration Judge and the Board, we deem it appropriate to exercise our sua sponte authority in order to afford the respondent an opportunity to present her request for relief before an Immigration Judge. See *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009); *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008); *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008). Accordingly, the motion to reopen is, hereby, granted, and the record remanded for further proceedings and the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Hartford, CT

Date:

MAY 25 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Isejn Marku, Esquire

APPLICATION: Reopening

This matter was last before the Board on August 20, 2008, when we dismissed the respondent's appeal after a remand from the United States Court of Appeals for the Second Circuit. On March 18, 2016, more than 7½ years after the Board's order, the respondent filed a motion to reopen.¹ The motion will be denied.

The respondent's motion is untimely, as it was not filed within 90 days of the Board's final administrative decision. Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, urges that his motion falls within the exception to the time limitations for motions to reopen to apply or reapply for (b) (6) arising in the country of nationality. Section (b) (6) of the Act; (b) (6). Specifically, the respondent argues that (b) (6) in Macedonia (b) (6) since 2014 and he has (b) (6) in Macedonia. In support of the motion, the respondent submitted a new (b) (6) application and a report and media articles on country conditions in Macedonia.

The evidence submitted by the respondent is insufficient to show (b) (6) to the respondent's (b) (6) claim. In the prior decision, the Board found that, even if the respondent is deemed to be credible and to have (b) (6) in Macedonia (b) (6), there has been a (b) (6) such that the respondent no longer has a (b) (6) in Macedonia. The Board specifically noted several events in Macedonia, including (b) (6)

¹ The respondent submitted a document entitled "Affirmation in Support" by the counsel, which includes mixed legal and factual "affirmation" by the counsel, and we will treat this document as a motion. However, to the extent the factual assertions in this document are not based on personal knowledge of the counsel, it does not qualify as evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

(b) (6) [REDACTED]

insurgents; the amendment of the country's constitution to protect civil rights; and the completion of nearly all legislative actions required by the post-conflict Framework Agreement aimed at enhancing minority civil rights by the end of 2004. The Board also concluded that

(b) (6) [REDACTED] and

(b) (6) [REDACTED].

The documents submitted with the motion show that Macedonia has remained largely peaceful, although (b) (6) [REDACTED] (Motion Tab C-A, at 10; Tab C-C, at 22). The documents further show that (b) (6) [REDACTED] continue to complain of (b) (6) [REDACTED] and public enterprises, and continue to demand equal rights through protest and other actions, although (b) (6) [REDACTED] has increased (Motion Tab C-A, at 10; Tabs C-B and C-C). These conditions or circumstances are substantially similar to, and are the continuation of, the conditions or circumstances at the time of the respondent's previous hearing, rather than (b) (6) [REDACTED]. Therefore, the respondent's motion does not fall within an exception to motion to reopen time limitations based on c(b) (6) [REDACTED], and will be denied as untimely.

Furthermore, based on the (b) (6) [REDACTED] presented in the documents submitted, the presumption of (b) (6) [REDACTED] to the respondent will likely remain rebutted in the respondent's case, such that the respondent is not prima facie eligible for (b) (6) [REDACTED] or related forms of relief. Based on the above, the respondent's motion will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUL - 1 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rosana Kit Wai Cheung, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6)

The respondent, a native and citizen of El Salvador, has appealed from an Immigration Judge's March 3, 2010, decision denying her applications for (b) (6). The Department of Homeland Security ("DHS") has not filed a response to the respondent's appeal. The record will be remanded.

We review the Immigration Judge's factual findings for clear error. 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion and judgment and all other issues are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent first arrived in the United States on December 14, 2004, and filed her application for (b) (6) on January 30, 2008 (Exh. 2). The Immigration Judge held that the respondent's (b) (6) application is (b) (6). See section (b) (6) of the Immigration and Nationality Act, (b) (6). Further, the Immigration Judge found that the respondent did not submit sufficient evidence to warrant an (b) (6) such as evidence of (b) (6) (I.J. at 5). The respondent argues on appeal that the DHS served her with a Notice to Appear on December 15, 2004, but requested rescheduling of the initial hearing before the Immigration Judge. The initial hearing was not scheduled until June 11, 2007, and the respondent filed the (b) (6) application at the first opportunity to do so after her appearance before the Immigration Judge. We find that the respondent filed the application (b) (6) of her first court hearing through no fault of her own. We will therefore treat the respondent's (b) (6) application as (b) (6).

The respondent bases her claim for (b) (6) with whom she lived for 6 years and who is the father of two of her children. In addition, she claims (b) (6) after she (b) (6).

(b) (6)

The Immigration Judge found the respondent's claim (b) (6) to be lacking in credibility. In particular, the Immigration Judge cited an inconsistency between the respondent's original and supplemental declarations regarding the reason she came to the United States. In the first declaration, she stated that after (b) (6), she found a job as a waitress, started a new relationship, and her personal life was fine. She indicated that she came to the United States because of (b) (6) by (b) (6) and because her sick mother needed help (Exh. 2). Yet, the respondent's supplemental declaration states that after she (b) (6) and (b) (6), which (b) (6) El Salvador (Exh. 3A).

However, the Immigration Judge never asked the respondent to explain why her first declaration omitted mention of (b) (6). The fact that the respondent's original declaration states that her personal life was fine after she (b) (6), relocated, got a job, and began a new relationship does not mean that (b) (6). Nor does the fact that the respondent left her children in El Salvador with an aunt when she came to the United States undermine her credibility (I.J. at 3-4, 9; Tr. at 46). Thus, we reverse the Immigration Judge's adverse credibility finding and will treat the respondent as credible.

The Immigration Judge held that, if the respondent was credible, she demonstrated (b) (6) who believed that (b) (6) (I.J. at 7-8). The DHS has not challenged these findings on appeal. However, the Immigration Judge held that a preponderance of the evidence rebuts the presumption of (b) (6) on this basis (I.J. at 9-11). We discern no clear error in this finding. As the Immigration Judge noted, the respondent was (b) (6) in 1998, did not (b) (6) for the United States in 2004, and she was (b) (6) (I.J. at 10; Tr. at 46, 54-55). Thus, we discern no clear error in the Immigration Judge's finding that a preponderance of the evidence indicates that (b) (6) such that the respondent (b) (6).

The respondent also claims that she (b) (6). We discern no clear error in the Immigration Judge's findings that (b) (6) (I.J. at 8-9). The respondent testified that (b) (6) (Tr. at 49). The respondent's link to (b) (6), do not constitute (b) (6), as she claims on appeal. (b) (6) (9th Cir. 2008). Moreover, the respondent is not able to (b) (6) (Tr. at 59). Thus, the respondent has not shown (b) (6). See (b) (6) (9th Cir. 2010) (I.J. at 8-9).

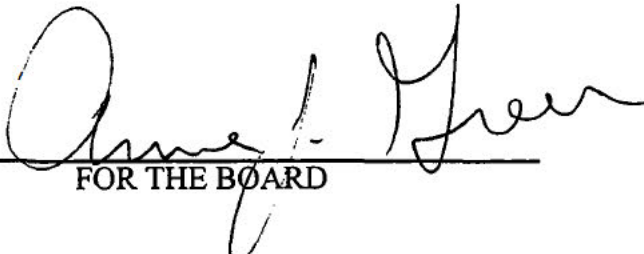
(b) (6)

The respondent has raised the issue of (b) (6) on the Notice of Appeal, arguing that she (b) (6) her return and thus merits (b) (6). Because the Immigration Judge did not address the issue of (b) (6), we find it appropriate to remand the record for findings of fact and a decision on whether the respondent warrants (b) (6) under the regulations. See (b) (6) (BIA 2012).

The respondent further challenges the Immigration Judge's denial of (b) (6), arguing that the Salvadoran (b) (6). We conclude, however, that the Immigration Judge did not commit legal error or clear factual error in determining that the respondent has not shown a likelihood that she (b) (6). See (b) (6) (9th Cir. 2013); (b) (6). The respondent stated that she has (b) (6) and has pointed to no evidence that (b) (6) this (b) (6). Further, while the respondent argues that (b) (6) before, this evidence did not require the Immigration Judge to find a (b) (6) in the case of this particular respondent. See (b) (6) (9th Cir. 2010) (concluding that "generalized evidence of (b) (6) in Mexico" did not warrant (b) (6) relief); see also (b) (6) (9th Cir. 2008) (a petitioner must show for purposes of (b) (6) relief that (b) (6)).

Accordingly, the following order will be entered.

ORDER: The record will be remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Arlington, VA

Date:

JAN 27 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James A. Roberts, Esquire

ON BEHALF OF DHS: Jill J. Parikh
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on January 12, 2009, when we denied the respondent's motion to reopen. On December 3, 2015, the respondent filed another motion to reopen.¹ The Department of Homeland Security has opposed the motion. The motion will be denied.

The respondent's motion to reopen is untimely and number-barred. Section 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent, however, urges that his motion falls within the exception to the time and number limitations for motions to reopen to apply or reapply for (b) (6) arising in Sudan. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). In support of the motion, the respondent submitted the statements of himself and his former wife, a document purported to be the death certificate of his father, and a new (b) (6) application.

We first note that the respondent was ordered removed to Chad, and to Sudan only in the alternative. Even if we were to consider changes in country conditions in Sudan, the respondent did not show (b) (6) in Sudan (b) (6) claims. The respondent's and his former wife's statements state that the (b) (6) him and his former wife's place of employment (b) (6) members, and his father passed away in 2013 after moving (b) (6)

¹ The respondent states that he submitted his motion to reopen on or about August 14, 2015. However, the record indicates that this document was rejected because it was not submitted with a certificate of service on DHS (DHS Opp. Exh. 1), and it was not properly filed until December 3, 2015. In any event, even if the motion were properly filed on August 14, 2015, it still would have been untimely and number-barred.

(b) (6)

(b) (6) (Resp. Statement, at 2-4), due to (b) (6) of the respondent while living in Sudan.

We first note that the respondent's motion is based on (b) (6). The Immigration Judge denied the respondent's applications for (b) (6) and related forms of relief based on an adverse credibility finding and the respondent's failure to substantiate or corroborate his claims. The respondent's motion does not address the adverse credibility finding, which was upheld by the Board in a prior decision. *Cf. Liang v. Holder*, 626 F.3d 983, 990 (7th Cir. 2010) (prior adverse credibility finding is relevant in assessing the authenticity and reliability of documents submitted with a motion to reopen); *Toufighi v. Mukasey*, 538 F.3d 988, 996-97 (9th Cir. 2008) (underlying adverse credibility determination rendered evidence of (b) (6) immaterial regarding the same basis for (b) (6) and related forms of relief); *Zheng v. Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007).

Furthermore, even if we were to consider the respondent's claims made in the motion, the evidence submitted by the respondent is insufficient to show (b) (6) in Sudan material to his (b) (6) claims. The respondent's and his former wife's statements were not made under penalties of perjury and not sworn to by them before an officer authorized to administer oaths; therefore, they do not qualify as affidavits. *See Black's Law Dictionary* (9th Edition 2009) (defining affidavit as a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths"). As the respondent's statement was not signed by anyone and his former's wife's statement was not made before a notary public in Sudan, we cannot be certain of the declarants' identity, much less the reliability of the substance contained in these statements. The respondent submitted a copy of what appears to be his former wife's identity card, but this document is largely illegible due to the poor quality of the copy. We also note that the English translation of the respondent's father's death certificate was not accompanied by a certificate of translation as required in 8 C.F.R. § 1003.2(g)(1). *See also* 8 C.F.R. § 1003.33. Accordingly, we have no basis for concluding that the translation is complete and accurate, and we decline to consider this document. In any event, this document appears to show that the respondent's father, age (b) (6), was deceased on (b) (6) 2011, although the respondent states that his father had "a (b) (6)" for 76 years before he passed away in 2013 (Resp. Statement, at 3).

Based on the above, the respondent did not show (b) (6) in Sudan material to his claims for (b) (6) and related forms of relief. The respondent also did not show that he is prima facie eligible for (b) (6) or a related form of relief based on the evidence submitted. Accordingly, the respondent's motion will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Detroit, MI

Date:

In re: (b) (6)

MAY 25 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Martin C. Van Houzen, Esquire

ON BEHALF OF DHS: Robert Metzgar
Assistant Chief Counsel

APPLICATION: Reopening

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to reapply for (b) (6). In our April 4, 2014, decision we dismissed his appeal from the Immigration Judge's August 6, 2012, decision which found him removable, denied his applications for (b) (6), granted him (b) (6), and found that he filed a (b) (6) application. However, we reversed the Immigration Judge's (b) (6) application finding. The Department of Homeland Security opposes the motion. The motion will be granted.

The respondent's motion to reopen filed in March of 2016 is untimely. He shows (b) (6) in Iraq that are material to his (b) (6) claim.

Although the Immigration Judge made an adverse credibility finding, he found that the respondent showed that he was a (b) (6) (I.J. at 8, 18). His final merits hearing was held on August 6, 2012. Country conditions evidence in the record as of the hearing date includes the Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Iraq Religious Freedom Report – 2010* (Nov. 2010) [Exh. 3-B]. The *Religious Freedom Report* at 7 (83) states that very few of the (b) (6). During a 10-day period in early October of 2008, (b) (6); during the last months of 2008, the (b) (6) to Mosul. *Id.* at 13-14 (89-90).

The respondent presents recent country conditions evidence. The August 8, 2014, <http://www.theguardian.com> article (Motion Exh. G) at 17 states that the Iraq-based leader of the (b) (6) said that about (b) (6) earlier in the week after the Islamic State of Iraq and Syria ("ISIS") (b) (6). The August 9, 2014, <http://www.latimes.com> article (Motion Exh. K) at 28 states that many Iraqi (b) (6) stated that (b) (6) in Iraq.

The contrast in the (b) (6) in Iraq between the country conditions evidence in the record as of the August 6, 2012, hearing and the respondent's recent country conditions evidence is startling. Whereas previously (b) (6) (and the majority (b) (6) later), in 2014 about (b) (6) return. In 2014 many (b) (6) in Iraq. Therefore, we conclude that there exist sufficiently (b) (6) in Iraq pertaining to the respondent's claim as (b) (6) such that reopening for further consideration of his application for (b) (6) is warranted.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Chicago, IL

Date: JAN 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jennifer Yule DePriest, Esquire

ON BEHALF OF DHS: Seth B. Fitter
Senior Attorney

APPLICATION: Reopening; reissuance

The respondent's motion is untimely. The Board entered the final administrative order in these proceedings on March 19, 2015, when it dismissed the respondent's appeal of the Immigration Judge's denial of her applications for (b) (6), affirming the Immigration Judge's grant of (b) (6), and remanding the record for updated security checks. The respondent filed her motion to reopen and reissue the Board's decision on November 13, 2015, approximately 8 months after the Board's final decision. 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (DHS) opposes the motion. The motion will be denied.

The respondent has not demonstrated that any of the statutory or regulatory exceptions to the time limitations on motions to reopen apply to her case. *See* section 240(c)(7)(C)(ii-iv) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(ii-iv); 8 C.F.R. § 1003.2(c)(3). We also decline to reopen these proceedings under our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a). We agree with the DHS that the Board lacks authority to review USCIS's denial of the respondent's request for the Secretary of Homeland Security to exercise his discretionary authority under section 212(d)(3)(B)(i) of the Act, 8 U.S.C. § 1182(d)(3)(B)(I), not to apply section 212(a)(3)(B)(iv)(VI) of the Act to certain individuals who provided certain limited material support (CLMS) or insignificant material support (IMS) to an undesignated terrorist organization described under section 212(a)(3)(B)(vi)(III) of the Act, provided certain requirements are met. 79 Fed. Reg. 6913, 6914 (February 5, 2014); *see Matter of S-K-*, 23 I&N Dec. 936, 941 (BIA 2006) ("Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals."). We find the respondent's arguments regarding 8 C.F.R. § 212.4(b) unavailing as they apply to individuals in proceedings under section 235 or 236 of the Act and the respondent is in proceedings under section 240 of the Act.

In the alternative, the respondent requests that the Board to reissue its March 19, 2015 decision. The Board has on occasion reissued its decisions, but generally only due to Board error

or administrative problems involving receipt of the Board's decision. Federal regulations require the Board to serve its final decision on the alien, 8 C.F.R. § 1003.1(f). "Service" is defined as either "physically presenting or mailing a document to the appropriate party or parties." 8 C.F.R. § 1003.13.

The respondent does not allege that she did not receive the Board's decision. Moreover, the respondent acknowledges that she has a timely petition for review of the Board's March 19, 2015, decision currently pending before the United States Court of Appeals for the Seventh Circuit. Thus, we see no reason to reissue our previous decision where it will not alter the outcome of these proceedings or the pending petition for review. It appears that the respondent is arguing that the reissuance of the Board's March 19, 2015, decision will put the USCIS's exemption denial before the Seventh Circuit. However, as we previously stated, neither the Board nor the Immigration Judge has authority of the Security of Homeland Security's exercise of his discretionary authority under section 212(d)(3)(B)(i) of the Act. Accordingly, the motion to reopen and reissue our decision will be denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reissue is denied.

A handwritten signature in black ink, appearing to be 'Am', is written above a horizontal line.

FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date: JAN 21 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ludovino Perez Gardini, Esquire

APPLICATION: Rescission

On October 19, 2015, the respondent submitted his second motion to reopen proceedings in which the Board dismissed his appeal of an Immigration Judge's decision denying his motion to reopen proceeding in which he was ordered removed in absentia to his native Brazil. The motion will be denied.

The respondent avers that he did not receive proper notice of the Notice to Appear (NTA) as it was not read to him in his native Portuguese. He also notes that he is the beneficiary of an approved visa petition filed on his behalf by his United States citizen wife, and that he wishes to pursue a provisional waiver of inadmissibility.

An order of removal that is issued following proceedings conducted in absentia pursuant to section 240(b)(5) of the Immigration and Nationality Act; 8 C.F.R. §§ 1003.23(b)(4)(i)-(ii), may be rescinded, in pertinent part, upon a motion to reopen filed at any time if the respondent demonstrates that he did not receive proper notice of the time and place of the hearing. *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995); *Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993). The respondent does not contest the fact that the NTA was personally served on him, as is reflected in that document, which bears his signature and fingerprint. The NTA also contained notice of the time and location of his January 17, 2006, hearing. The NTA advised the respondent of the consequences of failing to appear and his obligation to keep the Immigration Court apprised of address changes, and reflects that oral notice was provided in the Portuguese language.

While the respondent now alleges that the NTA was not read to him in Portuguese, and that the immigration officers only spoke English and Spanish, we note that he made no such allegations in his original motion to reopen. Counsel's speculations in this regard in the motion do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Rather, we presume that he received the advisals because federal employees are presumed to properly discharge their responsibilities. *United States v. Armstrong*, 517 U.S. 456 (1996). In addition, the law does not require that the NTA be in any language other than English to constitute effective notice. Section 239 of the Act, 8 U.S.C. § 1229.

The respondent concedes that when he was detained by immigration officers he signed paperwork, he does not dispute that his signature appears on the NTA, and he has not claimed that he made any effort to ascertain the contents of those documents until he first contacted "legal counsel" (Affid.). This was apparently in conjunction with his 2012 motion to reopen,

which was filed more than 6 years after the Immigration Judge's absentia order. In contrast to his current claims regarding notice, the record contains a Notice of Rights and Request for Disposition indicating that it was read to him in Portuguese, and bearing his initials next to a request for a hearing before the Immigration Court (MTR #1, pg. 13). A Record of Deportable/Inadmissible Alien, Form I-213, states that all forms were translated and explained in Portuguese to the respondent, in addition to the NTA. Given this record, we do not credit the respondent's claim that he received inadequate notice.

We are not unsympathetic to the situation faced by the respondent and his family. However, the pendency of an approved visa petition does not support reopening as his motion is not timely filed, and he receive oral warnings in his native language of the consequences of failing to appear as ordered. *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998). Further, the respondent is ineligible for an unlawful presence waiver because of his final removal order. 8 C.F.R. § 212.7(e)(4)(vi).

In sum, we find that rescission of the Immigration Judge's absentia order is not warranted as the respondent has not shown that he did not receive proper notice. Accordingly, the following order shall be entered.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Detroit, MI

Date: MAY 31 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alexander A. Melnikov, Esquire

ON BEHALF OF DHS: Theresa Bross
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has filed an untimely, number-barred motion to reopen, which will be denied. The respondent is a native and citizen of the Ukraine. The Immigration Judge found that the respondent's testimony was not credible regarding her (b) (6) claim, and denied (b) (6). The Immigration Judge also denied voluntary departure as a matter of discretion based on a number of adverse factors. On September 17, 2010, the Board dismissed the respondent's appeal.

On June 3, 2015, the Board denied the respondent's first motion to reopen as untimely. The respondent's first motion (b) (6) based on her brief (b) (6) in Ukraine as an advertising coordinator in late 2003 and early 2004. We denied the motion because the respondent had not submitted a new (b) (6) application, she had not authenticated official documents in any adequate manner, and she had not demonstrated she was prima facie eligible for relief. In particular, the Board identified certain factors indicating that her new claim lacked veracity (BIA Dec. dated 6/3/15 at 2).

The respondent has now filed a second motion to reopen. She asserts the same basis for relief, but this time includes (b) (6) application and alleges that she has now received a second notice to appear for her failure to appear for questioning due to her (b) (6) in 2004. The Department of Homeland Security opposes the granting of the motion.¹ For the reasons set out below, the motion to reopen will be denied.

¹ The respondent contends that this motion should be deemed unopposed because DHS responded to the opposition late. We disagree. The DHS's opposition was filed with the Board on August 3, 2015, within 13 days of the respondent's service of her motion to reopen. 8 C.F.R. § 1003.2(g)(3). It was therefore filed timely. However, the DHS's opposition listed opposing counsel's old address so DHS again filed the opposition (identical to the first opposition) and served it on opposing counsel at his new address. Moreover, given these circumstances, we also consider the DHS opposition as a matter of discretion. *Id.*

With limited exceptions, a motion to reopen must be filed within 90 days of the date of entry of a final administrative order of deportation or removal. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6)

(b) (6) in the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), *aff'd Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008); *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 956 (BIA 1999).

Moreover, a motion to reopen “shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material” and “must be accompanied by the appropriate application for relief and all supporting documentation.” 8 C.F.R. § 1003.2(c)(1). A motion to reopen “shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing” *Id.* The movant must establish *prima facie* eligibility for the relief sought, *INS v. Doherty*, 502 U.S. 314, 319 (1992); *INS v. Abudu*, 485 U.S. 94, 104-05 (1988), and satisfy the “heavy burden” of establishing that if the proceedings were reopened, with all the attendant delays, the new evidence would likely change the result in the case, *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Even with the inclusion of the (b) (6) application and the additional notice, the motion is denied. The claim does not establish a *prima facie* case for (b) (6). Considering the limited evidence submitted, the claim does not *prima facie* show that there is a reasonable possibility or that (b) (6) upon her return to Ukraine. *See* (b) (6) (BIA 2007); (b) (6).

As we previously explained, the respondent’s original (b) (6) application, filed with the Immigration Judge in 2007, did not indicate that she was (b) (6), even though the (b) (6) application specifically asked whether she had (b) (6) (Exh. 2, p. 6, Question 3A.). She referenced (b) (6) but not (b) (6). *Id.* Her original (b) (6) application also did not indicate that she was (b) (6) in late 2003 to early 2004, a period of time covered by the question (Exh. 2, p. 4, Question 4). The respondent did not (b) (6) anywhere in her application. Similarly, she did not indicate at any point during her hearing that she (b) (6) (Tr. at 27-51). The lack of any mention of her (b) (6) during her proceedings before the Immigration Judge raises significant doubt as to the veracity of her current claim.

Moreover other than referencing a brief (b) (6) as an advertising coordinator, the respondent has not provided any details about the nature or extent of (b) (6) to establish, as she must, a *prima facie* case for the requested forms of relief.

She speculates that since (b) (6) in early 2014, there has been (b) (6) (Motion, Exh. A, Supplement B to (b) (6)). However, her speculation is not corroborated by the limited background evidence, which merely indicates that (b) (6) (Motion, Exh. D). Relying upon the purported notifications from the Ukrainian government, she speculates that her brief (b) (6) is the basis for the current (b) (6). However, those notifications have not been authenticated pursuant to (b) (6), or by any other means, which also raise doubts as to the veracity of the claim.

The respondent argues in her second motion that she is in the process of authenticating the documents from the Ukrainian government. However, she has not attached any documentation indicating that she has initiated such a process, and arguments of counsel in a brief or motion are not evidence. *Camaj v. Holder*, 625 F.3d 988, 991 n.3 (6th Cir. 2010). For the foregoing reasons, the respondent has not shown that she is prima facie eligible for the relief sought or met her heavy burden that the new evidence would likely change the result in her case. *Matter of Coelho*, *supra*.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Denver, CO

Date:

MAR 14 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Miguel R. Velasco, Esquire

ON BEHALF OF DHS: Marie E. Brown
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on November 4, 2014, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his request for a waiver under section 216(c)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1186(c)(4). On December 30, 2015, the respondent filed a motion to reopen based on a claim of ineffective assistance of counsel. The Department of Homeland Security (DHS) opposes the respondent's motion. The respondent's motion to reopen will be denied.

Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i), states that motions to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." We entered the final administrative order of removal in the respondent's case on November 4, 2014. The respondent, however, did not file his motion to reopen until more than one year later. The respondent's motion to reopen therefore is untimely.

The respondent does not claim that his motion fits within any of the statutory or regulatory exceptions to the filing deadline. The respondent instead states that the deadline for filing his motion should be equitably tolled because he has been the victim of ineffective assistance of counsel and has acted diligently in pursuing his case. In particular, the respondent claims that he has a valid claim for special rule cancellation of removal under section 240A(b)(2) of the Act, 8 U.S.C. § 1229b(b)(2), as the battered spouse of a United States citizen but his former attorney never explored this avenue of relief. In support of his claim, he has submitted an application for special rule cancellation, an affidavit from a member of his prior counsel's staff, a personal statement, and statements from friends.

The DHS opposes the respondent's motion on the grounds that he has not established due diligence, he has not met the procedural requirements for obtaining reopening on the basis of a claim of ineffective assistance of counsel, he has not shown ineffective assistance, and he has not established prima facie eligibility for the relief he seeks.

We agree with the DHS that the respondent has not met his burden of establishing that he is entitled to reopening to pursue additional relief. First, as the DHS contends, the respondent's statement does not contain sufficient detail to establish that he has acted diligently in pursuing

his case and discovering the alleged error of his prior attorney. The respondent states only that, when his appeal was dismissed, he consulted two other attorneys who advised him he was eligible for special rule cancellation. He does not state when he consulted these attorneys or when he hired his current attorney. Without this information, we do not have sufficient details to conclude that the respondent has acted diligently in pursuing his case.

Second, even if we were to conclude that the respondent had acted diligently, the respondent has not met the procedural requirements necessary to establish that he is entitled to reopening on the basis of a claim of ineffective assistance of counsel. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The respondent has stated only that he retained former counsel to represent him in removal proceedings; he has not provided any details regarding his agreement with his former attorney.

In addition, he has not established that he has notified his former attorney of the allegations against him or given this attorney an opportunity to respond. The fact that a former employee of this attorney is aware of the charges does not establish that the former attorney has been notified.

Finally, the respondent has not explained sufficiently why he has not filed a complaint against his former counsel with the appropriate disciplinary authorities. The respondent claims that a complaint is unnecessary in light of the statement he has from a former employee of his former attorney, but we disagree. The statement from the former employee indicates only that there was never a discussion of domestic violence in the meetings during which the employee served as translator. This information alone is not sufficient to establish ineffective assistance and it does not fulfill the purpose behind the complaint requirement. Accordingly, the respondent has not presented sufficient information to meet the procedural requirements set forth in *Matter of Lozada, supra*, and he is not entitled to reopening on the basis of his claim of ineffective assistance of counsel.

Further, the respondent has not established that he was prejudiced by any alleged error of his former attorney. The respondent claims he is and was eligible for special rule cancellation of removal, but the evidence he has presented is not sufficient to indicate that he is or was prima facie eligible for this form of relief. In particular, his statements and the statements of his friends do not show that he (b) (6) or that his removal would result in extreme hardship to himself or his United States citizen sons. The respondent has submitted essentially no information about his sons' circumstances, other than information in his application indicating they do not reside in the same state as him, or evidence indicating hardship of any kind if he is removed from the United States. Nor has he sufficiently shown that he merits relief in the exercise of discretion where his good moral character was raised as an issue in the proceedings below and addressed by the Board in its prior decision. Given these facts, the respondent has not met his burden of establishing that he was prejudiced by any alleged error of his prior attorney or that his case should be reopened to allow him to pursue additional relief.

Based on the foregoing, the respondent has not established that he is entitled to reopening of his proceedings due to ineffective assistance of counsel. We therefore deny his motion to reopen.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Charlotte, NC

Date:

FEB 18 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: P. Mercer Cauley, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled (withdrawn)

Lodged: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (conceded)

APPLICATION: Reopening

The respondent, a native and citizen of Brazil, appeals from the Immigration Judge's May 5, 2015, decision denying his April 20, 2015, motion to reopen proceedings. The appeal will be dismissed.

We review findings of fact for clear error, including credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was admitted to the United States as a nonimmigrant visitor on (b) (6), 1999, but remained longer than authorized (I.J.1 at 1; Exh. 1A; Exh. 2, Tab C).¹ Before the Immigration Judge, the respondent applied for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), based on an approved Alien Relative Petition (Form I-130) filed on his behalf by his United States citizen spouse (I.J.1 at 1; Exh. 2, Tab B). The Immigration Judge found the respondent statutorily ineligible to adjust his status because he concluded that the respondent made a false claim to United States citizenship in 2007 on a voter registration card that rendered him inadmissible (I.J.1 at 3-4; Exh. 3). *See* section 212(a)(6)(C)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (providing that an alien who has falsely represented himself as a United States citizen for any purpose or benefit under the Act or any other Federal or State law is inadmissible); *see also Dakura v. Holder*, 772 F.3d 994, 998 (4th Cir. 2014) (explaining that the fraud waiver found at section 212(i) of the Act does

¹ The Immigration Judge issued decisions in this matter on January 20, 2015, and May 5, 2015, that will be referred to as I.J.1 and I.J.2, respectively.

not waive a respondent's inadmissibility under section 212(a)(6)(C)(ii)(I) of the Act, relating to false claims). Specifically, the Immigration Judge found that the respondent signed the card with the United States citizen box checked and that his signature certified the truth of the statements on the card under penalty of perjury (I.J.1 at 4).

In asserting that the voter registration card did not constitute a qualifying false claim to United States citizenship, the respondent testified that he believed the signature on the voter registration card was his, but contended he had not registered to vote and did not recall signing the card (I.J.1 at 2). He also testified that he believed that the card may have been in some paperwork he signed when obtaining his driver's license (I.J.1 at 2). The Immigration Judge found the respondent's testimony credible but concluded, when considering the totality of the evidence, that the respondent did not persuasively establish that he was unaware he signed the voter registration card (I.J.1 at 3). In any event, the Immigration Judge noted that (1) the respondent's driver's license number and address on the voter registration card were the same as the license number and address on his driver's license, (2) the signature on the card matched the signature of the respondent's adjustment of status application, and (3) the signature on the form was not an electronic one (I.J.1 at 4). Therefore, the Immigration Judge concluded that the respondent had made a false claim to United States citizenship when completing the voter registration application (I.J.1 at 4). The respondent did not appeal the Immigration Judge's decision.

On April 20, 2015, the respondent filed a timely motion to reopen proceedings with the Immigration Judge (Resp. Motion to Reopen). The respondent maintains that his motion is supported by newly discovered evidence corroborating his claim that he did not know that he signed the voter registration card on which he claimed to be a United States citizen (Resp. Motion to Reopen at unnumbered pp. 2-3). The respondent's new evidence is January 2, 2015, correspondence from the county Board of Elections notifying him that he "did not respond to a recent voter registration mailing" or that a voter registration mailing had been returned as undeliverable (Resp. Motion to Reopen at unnumbered p. 2, attachment at 2-3). The respondent also asserts he requested removal from the voter rolls in (b) (6) 2015 and he presented evidence of such removal, contending that this evidence is his timely recantation of his claim to United States citizenship (Resp. Motion to Reopen at unnumbered pp. 2-3, attachment at 4, 6-7). The Immigration Judge denied the respondent's motion, concluding that, assuming the evidence was new, it was not material as it did not alter the his prior false claim finding (I.J.2 at 2).

Because the respondent is appealing from the denial of his motion to reopen, the issue on appeal is whether the respondent's new evidence is material, meaning it is likely to affect the outcome of proceedings. See 8 C.F.R. § 1003.23(b)(3); *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). As found by the Immigration Judge, the mailing from the Board of Elections does not alter the prior determination that the respondent made a false claim to citizenship in signing the 2007 voter registration card under penalty of perjury (I.J.2 at 2; I.J.1 at 3-4; Resp. Motion to Reopen at unnumbered p. 2, attachment at 2-3). The fact that the respondent failed to respond to a voter registration mailing or that such a mailing was returned as undeliverable more than 7 years after he registered to vote does not sufficiently undermine the Immigration Judge's prior factual determinations regarding the false claim by persuasively establishing that the respondent was unaware he signed the voter registration card at the time he applied for his driver's license.

Moreover, because the respondent's new evidence is insufficient to alter the Immigration Judge's finding that the respondent made a false claim in signing the card in 2007, his evidence that he had himself removed from the voter registration rolls 7 years later, after being confronted with the claim in removal proceedings, does not constitute a timely retraction of his claim of United States citizenship. See *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973) (finding that an alien's correction of a false statement made under oath to a border patrol officer, when 1 year had passed and disclosure of the falsity was imminent, was not a timely retraction); *Matter of M-*, 9 I&N Dec. 118 (BIA 1960) (finding timely retraction where an alien corrected false statements to an immigration officer voluntarily and prior to exposure of the misrepresentation); *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949). For these reasons, we affirm the Immigration Judge's denial of the respondent's motion to reopen.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Philadelphia, PA

Date: FEB - 5 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sergey V. Makarov, Esquire

APPLICATION: Reopening; stay of removal

The Board entered a final administrative decision in this matter on July 6, 2010. On November 23, 2015, the respondent filed the instant motion to reopen his removal proceedings, with an accompanying request for a stay of removal. The motion, to which the Department of Homeland Security (DHS) has not responded, will be denied.

The respondent seeks reopening to apply for (b) (6) in his native country of the Ukraine. He claims that he (b) (6) upon his repatriation by (1) the (b) (6); and (2) (b) (6). The respondent claims that (b) (6) with (b) (6) so. The respondent (b) (6) of Ukraine, and who are (b) (6) the Eastern Ukraine." (Motion to Reopen at 6).

In support of reopening, the respondent has submitted a (b) (6) and an accompanying statement. He has also submitted various country reports and news articles related to the present (b) (6) so. Finally, the respondent has proffered letters from his daughters describing the (b) (6).

The instant motion is untimely because it was filed more than 5 years after the entry of our final administrative decision in this case. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). We recognize that there is an exception to the general 90-day time limitation on motions to reopen to apply for (b) (6) in the country of nationality, where the respondent proffers evidence that could not have been discovered or presented previously and that demonstrates prima facie eligibility for relief. See section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3); *Shardar v. Atty. Gen.*, 503 F.3d 308,

313 (3d Cir. 2007). However, the respondent has failed to demonstrate that this exception applies to his case.

Specifically, the respondent's evidence is insufficient to demonstrate his *prima facie* eligibility for relief. First, the respondent has not shown that (b) (6) upon his repatriation would (b) (6) for purposes of (b) (6). The respondent's claimed (b) (6) of Ukraine" is impermissibly circular in nature. See, e.g., (b) (6) (3d Cir. 2003) (providing that under the Act a "(b) (6)" must exist independently of the (b) (6)). The respondent also has not shown that a (b) (6) within Ukrainian society in general to qualify as a (b) (6) under the Act. See (b) (6) (BIA 2014) (clarifying that to qualify as a (b) (6) under the Act, the applicant must show that (b) (6)); (b) (6) (BIA 2014) (same). Similarly, any combination of those (b) (6) under the Act. *Id.*

Moreover, even assuming arguendo that the respondent is a (b) (6), he has not made a *prima facie* showing that he (b) (6) upon his repatriation. Even if the Ukrainian (b) (6) the respondent for failing to (b) (6) and "(b) (6)." See (b) (6) (internal citations and quotations omitted). The evidence is also insufficient to make a *prima facie* showing that the respondent will (b) (6) Ukrainian (b) (6) upon his repatriation.

In view of the foregoing, we find no basis to grant untimely reopening of these proceedings to allow the respondent to pursue his application for (b) (6). We also decline to grant untimely reopening for further proceedings on the respondent's application for (b) (6). The evidence proffered with the motion fails to make a *prima facie* showing that the respondent (b) (6) upon his repatriation. See (b) (6).

In sum, the respondent has failed to demonstrate that his motion falls within (b) (6) to the general 90-day time limitation on motions to reopen, such that reopening for further proceedings would be warranted. Accordingly, the following orders will be entered.

ORDER: The motion to reopen is denied as untimely.

FURTHER ORDER: The request for a stay of removal is denied as moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

APR 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Robert G. Berke, Esquire

APPLICATION: Reopening

This case was last before us on October 12, 2010, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his applications for (b) (6). On January 12, 2016, the respondent filed a motion to reopen based on a claim of ineffective assistance of counsel. The respondent's motion to reopen will be denied.

Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i), states that motions to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." We entered the final administrative order of removal in the respondent's case on October 12, 2010. The respondent, however, did not file his current motion until more than 5 years later. The respondent's motion to reopen therefore is untimely.

The respondent does not claim that his motion fits within one of the statutory or regulatory exceptions to the deadline for filing a motion to reopen. See section 240(c)(7)(C)(ii) – (iv) of the Act; 8 C.F.R. § 1003.2(c)(3). The respondent instead claims that he has been the victim of ineffective assistance of counsel and that his motion should be deemed to be timely because he filed it as soon as possible after he discovered the ineffective assistance.

The United States Court of Appeals for the Ninth Circuit, the circuit in which this case arises, has held that equitable tolling of the time limit for a motion to reopen is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." See *Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003). Even if we assume that the respondent acted diligently in pursuing his case, however, the respondent has not met the other requirements necessary to obtain reopening on the basis of a claim of ineffective assistance.

First, the respondent has not satisfied the procedural requirements that must be met before we will reopen proceedings due to ineffective assistance. See *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In particular, he has not established that he has notified his former attorney of the allegations against him and he has not filed a complaint with the relevant disciplinary authorities. The respondent has submitted a letter that his current attorney sent to his former attorney, but the letter only asks the respondent's former attorney about the respondent's case. The letter does not mention a claim of ineffective assistance. Accordingly, the respondent's former attorney was not given a true opportunity to respond to the allegations against him. This opportunity is

important because the responses from accused attorneys may provide a different perspective on the facts and may help distinguish cases involving errors or lack of cooperation on the alien's part from cases involving attorney ineffective assistance. *See Matter of Lozada, supra.*

The requirement that a complaint be filed with the relevant disciplinary authorities serves a similar purpose. The requirement helps to ensure that claims of ineffective assistance are bona fide rather than a tool agreed upon by attorney and client to obtain reopening. The respondent claims in his motion that filing a complaint is not necessary in his case because the ineffective assistance is plain on the face of the record. The respondent, however, has not submitted sufficient evidence to establish that his representation before the Board or the Immigration Judge was ineffective.¹ Accordingly, we find that the respondent's partial compliance with the Lozada requirements is insufficient.

In addition, the respondent has not shown that the alleged errors of his former attorney resulted in prejudice. *See Mohammed v. Gonzales*, 400 F.3d 785, 793-94 (9th Cir. 2005) (stating that prejudice results when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings). The respondent claims that his former attorney failed to define a particular social group in a particular manner and that this error might have affected the outcome of his case. The respondent, however, apparently through his former attorney, raised this issue on appeal and had it addressed at that time. Accordingly, the respondent has not shown that this alleged error might have affected the outcome of his proceedings.

The respondent also alleges that his former attorney filed the respondent's appeal with this Board as if the respondent were pro se. While this act appears unethical, the respondent has not established that the act could have affected the outcome of his appeal.

¹ The respondent also claims his former attorney filed his appeal but indicated the appeal was pro se. While this act is unethical and warrants further investigation, the respondent has not shown that it affected his proceedings. Further, the other charges the respondent has raised against his former attorney do not relate to misconduct during his removal proceedings and therefore do not constitute ineffective assistance in this context. For instance, the filing of relief applications before the DHS occurred outside of his proceedings. In addition, these filings appear to have resulted in a benefit to the respondent to which he was not entitled rather than a detriment. Accordingly, while his former attorney's alleged conduct in this area appears to have been unethical and to warrant sanctions, the respondent has not established that it resulted in harm to him or constituted ineffective assistance in removal proceedings. In addition, while the respondent claims that his former attorney committed certain errors in pursuing a petition for review with the Ninth Circuit, these errors occurred outside removal proceedings. Further, the respondent has not submitted a copy of the brief his former attorney submitted to the Ninth Circuit, and the Ninth Circuit did address his eligibility for (b) (6) in dismissing his petition for review, despite his claims to the contrary.

Finally, the respondent alleges that his former attorney committed other errors, but these errors occurred outside of his proceedings before the Immigration Judge and this Board. The errors therefore did not affect the outcome of his proceedings.

Based on the foregoing, the respondent has not submitted sufficient evidence to meet his burden of establishing that he is entitled to reopening due to ineffective assistance of counsel. We therefore deny his motion to reopen.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Antonio, TX

Date: SEP 18 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Rosana Kit Wai Cheung, Esquire

APPLICATION: Reconsideration

The respondent has filed a motion to reconsider the Board's decision dated May 28, 2015. In that decision, the Board dismissed the respondent's appeal from the Immigration Judge's denial of the respondent's motion to reopen following a March 2, 2006, in absentia order of removal. The record before us does not contain a reply from the Department of Homeland Security (DHS). The motion will be granted in part and denied in part.

A motion to reconsider must identify an error of fact or law in the Board's prior decision. See section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) (finding that a motion to reconsider must allege a material factual or legal error or argue a change in law).

The record establishes that the respondent's removal hearing took place on March 2, 2006. The respondent was not given notice of the hearing because she did not provide the immigration court with an address in the United States for service of the Notice of Hearing. In ordering the respondent removed in absentia, the Immigration Judge found that the respondent had failed to provide the immigration court with her address after having been advised of the requirement in the Notice to Appear (NTA), which was served on the respondent in person. The Immigration Judge relied upon the information in the Form I-213 (Record of Deportable/Inadmissible Alien) to find the respondent subject to removal and to order her removed to El Salvador.

The respondent's motion to reopen was based in part on a claim that the respondent was never notified of any requirement to provide the immigration court with an address for service of the Notice of Hearing or that she was being referred to the immigration court. The respondent, however, acknowledged signing the NTA. The Immigration Judge concluded that the NTA provided the respondent with the required notice. Given that the respondent admits signing the NTA, there was no error in our affirmance of the Immigration Judge. The respondent had all the notice that the statute requires.¹ The NTA explains in English that the respondent is required to provide an address to the immigration court, that this address is used to mail the Notice of Hearing, and that if no address is provided where the respondent can be reached, the respondent

¹ The respondent's current motion also admits that the respondent was given a copy of the NTA.

is not entitled to notice of her hearing. We note that there is no requirement that the respondent be given notice orally or in a language she understands of the contents of the NTA, including the requirement that she provide a mailing address for service of the Notice of Hearing.² Accordingly, the respondent has not established that the Board erred in affirming the Immigration Judge's decision that the respondent was provided notice as required in the statute and thereafter failed to appear at her hearing.

The respondent has also established no error in the Board's decision insofar as it affirmed the denial of reopening to apply for (b) (6). The respondent did not establish that her motion was based on a claim of (b) (6) for motions to reopen. The respondent additionally did not establish that proceedings should be reopened sua sponte.

As a separate matter, however, we are concerned that the respondent was ordered removed to El Salvador. The Immigration Judge's decision states that the respondent claimed to be a native and citizen of Nicaragua throughout her motion to reopen and in the attachments but that no evidence was submitted to establish the claim. The Immigration Judge did not address the issue further. The Board's decision did not address the issue of nationality at all. Upon review of the record, however, we conclude that the exhibits attached to the respondent's motion to reopen constitute evidence that the respondent is a native and citizen of Nicaragua. The respondent's place of birth is listed on her own statement (Mot. Exh. A); on a receipt from U.S. Citizenship and Immigration Services (USCIS) for the Form I-130 filed on the respondent's behalf (Mot. Exh. C); on the respondent's (b) (6) application (Mot. Exh. D); and on a statement from the respondent's sister (Mot. Exh. E).³

Given the evidence that the removal order dated March 2, 2006, orders the respondent removed to an incorrect country, we find it necessary to reconsider our last decision insofar as it failed to address the proper country of removal. Our decision dated May 28, 2015, will be amended to reflect that the country of removal is Nicaragua.

Finally, insofar as the respondent may seek a favorable exercise of prosecutorial discretion, she must direct her request to the DHS.

The following orders will be entered.

ORDER: The respondent's motion to reconsider is granted in part and denied in part.

² The NTA in the record before us contains a statement that the respondent was orally notified in Spanish of the time and place of her hearing and the consequences of failing to appear. There is no assertion that she was notified of the address requirement in Spanish. We note that the respondent could not have been notified in Spanish of the time and place of her hearing given that the hearing date had not been set.

³ We now also have the respondent's marriage certificate, which lists her place of birth as Nicaragua.

FURTHER ORDER: The Board's decision dated May 28, 2015, is amended to reflect that the proper country for removal in this matter is Nicaragua.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Baltimore, MD

Date:

OCT 22 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jude Ambe, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Reconsideration

The respondent, a native and citizen of Ethiopia, filed a timely motion to reconsider on August 10, 2015. See section 240(c)(6)(C)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6)(C)(B); 8 C.F.R. § 1003.2(b)(2). The motion to reconsider takes issue with the Board's July 13, 2015, decision affirming the Immigration Judge's May 31, 2012, decision denying the respondent's motion to reopen her removal proceedings. It also requests a stay of the respondent's removal from the United States. The Department of Homeland Security (DHS) opposed the respondent's appeal from the Immigration Judge's decision denying the motion to reopen, but has not filed a response to the respondent's motion to reconsider. The motion will be denied.

In a decision dated November 17, 2006, the Immigration Judge ordered the respondent removed after she conceded removability and withdrew her applications for (b) (6). (b) (6) (Tr. at 90-91). The Immigration Judge made a (b) (6) with respect to (b) (6) application, in which the respondent claimed a (b) (6). (b) (6) (I.J. (Nov. 17, 2006) at 1; Tr. at 96). The respondent waived her right to appeal the Immigration Judge's decision (I.J. (Nov. 17, 2006) at 1; Tr. at 96).

On March 12, 2012, the respondent filed a motion to reopen her removal proceedings, seeking relief based on (b) (6) in Ethiopia. On May 31, 2012, the Immigration Judge denied the motion. The Immigration Judge agreed with the DHS that the respondent's motion was untimely filed without an exception to the time limitation, and that the respondent had not shown prima facie eligibility for relief from removal.

First, we conclude that none of the respondent's arguments provides a proper basis for reconsideration of our July 13, 2015, decision. A motion to reconsider must identify an error of fact or law in the Board's prior decision. See section 240(c)(6)(C) of the Act; 8 C.F.R. § 1003.2(b); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) (finding that a motion to reconsider

must allege a material factual or legal error or argue a change in law). With her original motion to reopen, the respondent submitted letters from her brother and sister recounting their visit to Ethiopia, during which (b) (6)

(b) (6) In her current motion, the respondent argues that the Board made a legal error in finding that she had not established an exception to the (b) (6)

(b) (6) where we did not acknowledge that her siblings' visit to Ethiopia occurred after she submitted her original (b) (6) application, and therefore this information was new and unavailable and could not have been discovered or presented at her previous hearings (Resp. Mot. Reconsider at 3). However, we have already considered this evidence and found that the circumstance of her siblings' visit does not establish (b) (6) arising in Ethiopia such that an (b) (6) for a motion to reopen applies in this case (b) (6) (BIA July 13, 2015)).¹

In her motion for reconsideration, the respondent also refers to (b) (6) since the Immigration Judge's decision (Resp. Mot. Reconsider at 6). Specifically, she cites to *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009); *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008); and *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008) (Resp. Mot. Reconsider at 6). However, the respondent provides no analysis demonstrating any error in the Board's July 13, 2015, decision in relation to those cases. Therefore, because the respondent has not persuasively identified factual or legal error in the Board's prior decision, we find no basis for reconsideration of our decision.

Second, insofar as she seeks reopening of her proceedings, the respondent is time barred, where she has not established an (b) (6), and is barred from filing more than one motion to reopen. See section (b) (6) of the Act, (b) (6)

¹ Significantly, the respondent did not establish that the (b) (6) in Ethiopia is a recent phenomenon. The letter from the respondent's sister specifically states that both she and the respondent were (b) (6) (Resp. Motion to Reopen (Mar. 12, 2012)). Similarly, the country reports submitted by the respondent do not reflect a (b) (6), as they indicate (b) (6).

According to the 2010 country report, for example, "[i]n 2000 the Ethiopian Demographic and Health Survey found that (b) (6), while the total dropped to (b) (6) in 2005. Furthermore, (b) (6)

(b) (6); in 2005, (b) (6) compared with (b) (6)." Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *2010 Country Reports on Human Rights Practices - Ethiopia* (Apr. 8, 2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154346.htm>. The report also states that "[a] 2008 study funded by Save the Children Norway reported a (b) (6) cases over the past 10 years, due in part to a (b) (6)." See (b) (6) (allowing the Board to take administrative notice of the content of official documents). Thus, while the content of the letters from the respondent's siblings and the country reports is troubling, it does not reflect a recent (b) (6) in the respondent's native Ethiopia.

(b) (6)

(b) (6) Crucially, we note that the respondent is ineligible for any immigration benefit, based on the Immigration Judge's (b) (6). See section (b) (6) of the Act, (b) (6). As such, her argument that (b) (6) is foreclosed (Resp. Mot. Reconsider at 7).

Finally, we do not find exceptional circumstances that would warrant reopening of these proceedings pursuant to our discretionary sua sponte authority under 8 C.F.R. § 1003.2(a) (Resp. Mot. Reconsider at 6).² Accordingly, the following order will be entered.

ORDER: The respondent's motion to reconsider, and related request for a stay of removal, are denied.



FOR THE BOARD

² Any request for the favorable exercise of prosecutorial discretion or for general humanitarian relief from removal would have to be raised directly with the Department of Homeland Security.

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: JUN 08 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard Lucero, Esquire

APPLICATION: (b) (6)

The respondent, a native and citizen of China, appeals the Immigration Judge's March 4, 2015, decision¹ denying his applications for (b) (6) and for (b) (6). See section (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6). The Department of Homeland Security has not filed a brief in opposition. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent has not shown that the Immigration Judge's adverse credibility finding is clearly erroneous. The omissions and inconsistencies with the documents identified by the Immigration Judge are supported by the record. See 8 C.F.R. § 1003.1(d)(i); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003). The Immigration Judge identified specific omissions between the respondent's application and testimony as well as inconsistencies with the documentary evidence proffered by the respondent and based her determination on the "totality of the evidence" in assessing their cumulative effect supporting her determination that the respondent did not meet his burden of proof by credible evidence. See section (b) (6) of the Act; (b) (6) (9th Cir. 2010) (upholding adverse credibility finding pursuant to REAL ID Act credibility standards); *Matter of J-Y-C-*, 24 I&N Dec. 260

¹ The Immigration Judge issued her first decision on November 10, 2011, but the transcript was incomplete. The proceedings on November 10, 2011, will be referenced as "Tr.1 at ____." Further testimony was taken on October 21, 2013, (referenced as "Tr.2 at ____") to complete the missing cross-examination testimony (Tr.2 at 2-5). The Immigration Judge issued a new written decision on March 4, 2015, which is the subject of this appeal.

² The Immigration Judge also denied the respondent's application for (b) (6) (I.J. at 7). Section (b) (6) of the Act; (b) (6). The respondent did not contest this determination on appeal; therefore, we deem this issue waived. *Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007).

(b) (6)

(BIA 2007). The respondent has not established that these findings are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).³

Specifically, the Immigration Judge found that the respondent omitted any mention that the (b) (6) 2005, from both his application and during his interview at the (b) (6) (I.J. at 3; Exh. 2). The respondent testified that he (b) (6) and (b) (6) (Tr.1 at 56). He testified that the (b) (6) (Tr.1 at 56-57). On direct, the respondent proffered (b) (6). The respondent on cross-examination testified that he was (b) (6) the following week for (b) (6). When asked on direct, whether he had told this to (b) (6) during his interview, the respondent stated he was not asked (Tr.1 at 59).

On cross-examination, the respondent was asked why his application made no mention (b) (6), the respondent said he “overlooked the detail because I thought I had (b) (6) to prove that” (Tr.2 at 27-28). On cross-examination he testified that he was (b) (6); asked why he made no mention of this before, he said, “I didn’t think too much about this. I thought I had a (b) (6) to show that, and for that reason, I didn’t put it down on my application. It was my overlooking” (Tr.2 at 25-26). Asked where the so-called (b) (6) indicated this information, the respondent stated it was not written on the (b) (6) because he was told by (b) (6) (Tr.2 at 26). When questioned about (b) (6), which was the (b) (6) by the respondent in his declaration, and the absence of that information from (b) (6), the respondent said the (b) (6) (Tr.2 at 27; Exh. 2). The Immigration Judge found that the claim regarding (b) (6) were central to the respondent’s claim and that his explanation was not persuasive (I.J. at 3).

The Immigration Judge noted that another significant omission from the application was the absence of information regarding (b) (6), and only a passing reference to the (b) (6) into China (I.J. at 3). On direct testimony, the respondent had testified that the (b) (6) he should (b) (6) (Tr.1 at 58). Further, the respondent testified that he (b) (6) China because (b) (6).

³ The respondent cites pre-REAL ID Act cases that are not applicable to the Immigration Judge’s evaluation of the “totality of the circumstances” in assessing the respondent’s credibility and whether he met his burden of proof. Section (b) (6) of the Act. The respondent cites decisions that were overruled with passage of the REAL ID Act of 2005, which governs this case (Resp. Br. at 6-11). See *Shrestha v. Holder*, 590 F.3d 1034, 1043 n.3 (9th Cir. 2010).

(b) (6)

(b) (6) (Tr.1 at 64). When asked why there was no mention that (b) (6) with the (b) (6), the respondent testified that his wife had heard from the wife of his friend (b) (6) (who (b) (6) to China) that (b) (6) in (b) (6) (Tr.1 at 64; Tr. 2 at 33). When asked why this was not in his declaration, he stated that he (b) (6) at the end of 2006 or early in 2007. The respondent did not explain why he did not mention (b) (6) for (b) (6).

The respondent testified that (b) (6) that was not resolved. The respondent testified he was (b) (6) of 20,000 RMB, which was set at (b) (6) were (b) (6) (Tr.1 at 61). He testified that he was (b) (6) his home area. The Immigration Judge also found that the respondent's account of his travel within China was inconsistent with his claim that he was (b) (6) (I.J. at 4-5). The respondent testified that he flew to Beijing to attend the visa interview and flew back home without any interference (Tr.2 at 17-19). The respondent subsequently left China through Beijing airport. When asked how he was able to do this if he was (b) (6), the respondent answered that (b) (6). And there was (b) (6) me" (Tr.2 at 41-42). Nonetheless, the respondent testified that he would be (b) (6) after (b) (6) his home (Tr.1 at 64-65). The Immigration Judge was not persuaded that this testimony was credible in light of the background evidence that shows China does not (b) (6) (I.J. at 4-5; U.S. Department of State (b) (6) for 2010). Under the totality of the evidence, the Immigration Judge determined that the respondent was not credible. Section (b) (6) of the Act. The respondent has not established that her findings are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

The Immigration Judge correctly determined that the respondent's documentary evidence did not serve to establish the respondent's claim. The "(b) (6)" did not include the (b) (6) and was not certified (I.J. at 5; Exh. 2, Tab B). The (b) (6) did not correspond to (b) (6) claimed in the respondent's declaration; it made no mention of the respondent having (b) (6) and did not indicate the respondent (b) (6) (I.J. at 3; Tr.2 at 31-32). The respondent did not have an answer regarding that significant omission. Further, the Immigration Judge noted that the respondent's claim that he received the (b) (6) at the time of (b) (6) and was permitted to (b) (6) was implausible, particularly in light of his testimony that he was (b) (6) (I.J. at 3; Tr.2 at 31-32). The Immigration Judge found that the photograph supplied by the respondent could not be given evidentiary weight because there was nothing to establish the timing or that (b) (6) seen on the photograph were the (b) (6); thus, the photo did not serve to corroborate his testimony (I.J. at 3).

The Immigration Judge noted that the respondent's explanation that he was (b) (6) his wife to send a letter explaining his lack of (b) (6) was inconsistent with his testimony that he received the (b) (6) from his wife (I.J. at 3; Tr.2 at 9, 15). The respondent's Household Register issued in (b) (6) 2007 (after the respondent (b) (6) the United States) listed the respondent as the Head of Household and that he was employed at (b) (6) (Exh. 2 Tab D). The Immigration Judge was not persuaded by the respondent's explanation that this was not inconsistent with the respondent's claim that he had been (b) (6) 2005 (I.J. at 3-4; Tr.2 at 10-16). The Immigration Judge found that the letter submitted by the respondent regarding (b) (6) was of little evidentiary value because the letter was unsigned and undated and not on printed letterhead (I.J. at 5; Exh. 2, Tab A). In addition, the respondent did not explain how he was (b) (6) (Tr.2 at 11; Exh. 2 Tab C). The Immigration Judge is not required to adopt the respondent's explanations for omissions and inconsistencies when there are other plausible views of the evidence. *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011). Considering the "totality of the circumstances and all relevant factors," the Immigration Judge's adverse credibility finding is not clearly erroneous. *See* section (b) (6) of the Act; (b) (6).

The respondent bears the burden of proof on his application for relief from removal. Sections (b) (6) of the Act. *Matter of L-A-C-*, 26 I&N Dec. 516, 520 (BIA 2015) (respondent must submit reasonably available evidence); *Matter of S-M-J-*, 21 I&N Dec. 722, 725-26 (BIA 1997) (the respondent has the burden to prove his claim, even when credible, where it is reasonable to expect evidence to corroborate his claim). There is no clear error in the Immigration Judge's determination that the respondent failed to provide reliable testimony and evidence in support of his claim, based upon the cumulative effect of the omissions and inconsistent responses, together with inconsistent documents that were not adequately explained (I.J. at 3-6). The Immigration Judge also found that the evidentiary gaps were not bridged by corroborative evidence and found that the respondent had not established that documentary corroboration of his claim was not reasonably available (I.J. at 5-6).

We concur with the Immigration Judge's holding that in the absence of credible testimony the respondent did not establish his eligibility for (b) (6). *See* (b) (6) (BIA 1995) (b) (6) claim that lacks veracity cannot satisfy burdens of proof necessary to establish eligibility for (b) (6); *see also* (b) (6) (9th Cir. 2010); (b) (6) (9th Cir. 2001) ("If the trier of fact either does not believe the Respondent or does not know what to believe, the Respondent's failure to corroborate his testimony can be fatal to his (b) (6) application.").

Under these circumstances, considering the respondent's non-credible testimony, the evidence is not sufficient to prove he (b) (6). (b) (6) Since the respondent did not meet his burden of proof for (b) (6) he cannot meet the (b) (6)

(b) (6)

(b) (6) (I.J. at 11). See (b) (6) (9th Cir. 2009); (b) (6) (9th Cir. 2006).

We also affirm the Immigration Judge's denial of the respondent's application (b) (6), as we agree with her conclusion that the respondent's testimony and documentary evidence do not establish that he (b) (6) upon removal to China (I.J. at 7-8). See (b) (6) (BIA 2007); (b) (6) (A.G. 2006).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

APR - 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Armin A. Skalmowski, Esquire

APPLICATION: Reopening

The Board entered a final administrative decision in this matter on October 27, 2008. This matter was last before us on August 16, 2012, when we denied the respondent's first motion to reopen his removal proceedings. The respondent has now filed another motion to reopen. The motion, to which the Department of Homeland Security has not responded, will be denied.

The respondent is a Chinese (b) (6) who is a native and citizen of Indonesia. He seeks reopening to reapply for (b) (6). The respondent avers that there have been (b) (6) in Indonesia for (b) (6), such as himself, since his original hearing before the Immigration Judge in 2007 (Motion to Reopen at 2-3). The respondent cites, specifically, to the (b) (6) as well the (b) (6) in Indonesia (*Id.* at 3).

The respondent also asserts that (b) (6) (Motion to Reopen, Attached (b) (6) and Declaration). The respondents' parents were apparently (b) (6). The respondent further claims that his brother recently (b) (6).” (*Id.*). For the foregoing reasons, the respondent (b) (6) in Indonesia (b) (6) (*Id.*).

The respondent's motion to reopen is untimely and numerically barred. Sections 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). We recognize that there is an exception to the general time and number limitations for motions to reopen to apply or reapply for (b) (6) arising in the country of nationality, that could not have been discovered or presented at the previous hearing, and that establish *prima facie* eligibility for relief. Section (b) (6) (9th Cir. 2008). However, the respondent has failed to demonstrate that this exception applies to his case.

Specifically, the respondent has failed to demonstrate a (b) (6) in general, (b) (6) in general since the date of his last hearing, that would render him *prima facie* eligible for the relief that he seeks. The 2014 and 2015 Country Reports that are proffered with the motion reflect that the Indonesian (b) (6) (Motion to Reopen, Attached Exhibits at 12). The objective evidence submitted with the motion does not demonstrate that individuals of (b) (6) in Indonesia. The (b) (6) directed at the respondent's (b) (6), while regrettable, appear to be (b) (6) in nature and do not meaningfully demonstrate that the respondent himself may (b) (6) upon his repatriation (*Id.*, Attached (b) (6) and Declaration).

Further, although the evidence reflects that (b) (6) can sometimes (b) (6), it also states that the (b) (6) that do occur happen (b) (6) (Motion to Reopen, Attached Exhibits at 13, 27-28). The 2014 (b) (6) for Indonesia reflects that most of society is (b) (6) and that (b) (6) had actually declined since the prior reporting year (*Id.*, Attached Exhibits at 17). The respondent has not shown that (b) (6), related (b) (6), are material to him, inasmuch as he is not presently claiming to be (b) (6) (*See, e.g., id.*, Attached Exhibits at 3, 23, 72-74, 76, 78-79).¹ In any event, these events reflect conditions that are, unfortunately, substantially similar to those that existed at the time of the respondent's hearing, as is evidenced by the 2006 (b) (6) that is proffered with the motion (*Id.* Attached Exhibits at 38-47). Further, evidence of a 2013 (b) (6) and attempts in 2010 to (b) (6) in North Sumatra, is, without more, insufficient to make a *prima facie* showing that the respondent himself may (b) (6) upon his repatriation (*Id.*, Attached Exhibits at 88-93).

The respondent has also failed to demonstrate a (b) (6) in Indonesia. The evidence shows that the (b) (6) since its inception in 1999 (Motion to Reopen, Attached Exhibits at 73). And the respondent has not offered any evidence that would indicate that (b) (6) upon his repatriation.

As with his prior motion to reopen, the respondent has proffered no evidence that (b) (6) in Indonesia upon his

¹ Although the respondent (b) (6) in his last motion to reopen, he is not presently (b) (6) (*Compare* Motion filed March 26, 2012, with Motion to Reopen filed November 30, 2015).

(b) (6)


repatriation (b) (6) under the Act. Even under a disfavored-group analysis, he has failed to make a *prima facie* showing that he has a sufficient (b) (6) upon his repatriation. See (b) (6) (9th Cir. 2010); (b) (6) (9th Cir. 2009).

In view of the foregoing, the respondent has failed to demonstrate that he is entitled to reopening under the (b) (6) to the general time and number limitations on motions to reopen, for purposes of (b) (6). He also is not entitled to seek reopening to reseek (b) (6), as he has not made a *prima facie* showing that he (b) (6)

upon his repatriation to Indonesia. Accordingly, the respondent's motion to reopen will be denied.

Finally, we do not find that this case presents exceptional circumstances that would warrant reopening pursuant to our own discretionary *sua sponte* authority under 8 C.F.R. § 1003.2(a). See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Diego, CA

Date: APR 11 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reconsideration; reopening

This case was previously before us on November 25, 2015, when we dismissed the appeal of the Immigration Judge's decision dated November 20, 2013, which denied the respondent's application for a waiver of removability under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H). The respondent, a native and citizen of Mexico and lawful permanent resident of the United States, filed a timely motion to reopen and/or reconsider on December 22, 2015. The Department of Homeland Security (DHS) has not responded to the motion. The motion will be granted and the record remanded.

The record shows that the respondent filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on December 27, 2006, and that he was interviewed for the application on September 4, 2007 (Exh. 7). Pursuant to a criminal complaint filed on or about (b) (6), 2008, the respondent was convicted on (b) (6), 2008, in California State court under California Penal Code § 530.5(a), use of personally identifying information of another (Exh. 3a). His application for adjustment of status was approved on September 5, 2008 (Exh. 7).

In 2012, the DHS charged the respondent as removable under section 237(a)(2)(A)(i) of the Act (convicted of crime involving moral turpitude) (Exh. 1). The DHS subsequently withdrew that charge and lodged a new charge of removability under 237(a)(1)(A) (inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), (fraud or willful misrepresentation of a material fact)), based on the respondent's alleged failure to disclose on the adjustment application his arrest and conviction for violating California Penal Code § 530.5(a) (Exh. 1A; Tr. at 12).¹ The respondent, through

¹ In pertinent part, the adjustment application asks whether the applicant has ever, in or outside the United States:

- a. Knowingly committed any crime involving moral turpitude or a drug-related offense for which you have not been arrested?
- b. Been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?

counsel, conceded removability under the lodged charge (Tr. at 11-12). *See Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986). The Immigration Judge found, and the parties agreed, that the respondent was statutorily eligible for the requested waiver of removability but denied the waiver in the exercise of discretion. The Board dismissed the respondent's appeal of that decision.

In his motion, the respondent challenges whether he is in fact removable as charged. We emphasize that removability was not at issue before the Board or the Immigration Judge because the charge was conceded. However, the chronology of events discussed above does raise questions as to the respondent's removability. In addition, in a decision that followed both the issuance of the Board's decision and the filing of the respondent's motion, the United States Court of Appeals for the Ninth Circuit determined that a conviction for identity theft under California Penal Code § 530.5(a) was not categorically for a crime involving moral turpitude. *See Linares-Gonzalez v. Lynch*, Nos. 12-71142, 12-73313, 2016 WL 1084735 (9th Cir. Mar. 21, 2016). Under the circumstances, we find that it is appropriate to reconsider the removability issue. Inasmuch as doing so may require additional factfinding, a remand is required. *See* 8 C.F.R. § 1003.1(d)(3)(iv). Accordingly, the following order will be entered.

ORDER: The motion is granted, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: OCT 20 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ashley Gambourian, Esquire

APPLICATION: Reopening

The respondent's motion to reopen will be denied as untimely. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The Board entered the final administrative order on May 15, 2013, when we affirmed the Immigration Judge's decision denying the respondent's applications for (b) (6).

(b) (6).¹ The Department of Homeland Security has not responded to the motion. The motion and request for a stay of removal will be denied.

The respondent reiterates the claim that he (b) (6) in Armenia because of (b) (6). Although this is the same claim that the Immigration Judge and the Board previously denied, the respondent urges that his motion falls within the exception to the time limit for motions to reopen to reapply for (b) (6).

(b) (6). The respondent has submitted photocopies of his statement and a letter from his mother. The motion also includes the 2014 Department of State Country Report for Armenia and Internet-based news articles describing (b) (6).

Motions, even those that are timely filed, are disfavored in removal proceedings, where every delay works to the advantage of the alien. *See INS v. Doherty*, 502 U.S. 314 (1992). Because a motion to reopen is not an opportunity to repeat previously considered and rejected arguments, we will not revisit the respondent's allegations of persecution that occurred before the respondent's October 2012 final hearing. *See INS v. Wang*, 450 U.S. 139, 141 (1981) (discussing motions to reopen); *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991).

As to the remaining allegations, the respondent has not met his heavy burden of presenting sufficient evidence to warrant reopening. While the motion contains vague allegations that the

¹ The United States Court of Appeals for the Ninth Circuit denied in part and dismissed in part the respondent's petition for review on (b) (6), 2015 and denied his petition for rehearing on (b) (6), 2015.

(b) (6)

(b) (6) the respondent and (b) (6) to Armenia, the respondent has not adequately supported this claim. The respondent speculates that the Armenian (b) (6) to Armenia, but the respondent has not corroborated this allegation with independent credible evidence. Notably, the Immigration Judge found that the respondent's claims were not credible, and we did not disturb that finding in our dismissal of the respondent's appeal. We are particularly disinclined to credit the respondent's allegation that (b) (6), where he has provided no evidence that he has (b) (6) while living in the United States. Further, the sparse and unpersuasive letter from the respondent's mother supporting the motion (b) (6) the 3 years since the respondent's hearing (b) (6) the respondent. Nor is there any evidence that the respondent's mother, wife, children, and other family members (b) (6) since the respondent left Armenia. (b) (6) (BIA 1998) (b) (6)).

Furthermore, the respondent's evidence does not indicate that (b) (6) since his previous hearings in 2012. Rather, the evidence indicates that the (b) (6) (Compare Motion, Tab M with Exhs. 7, 8, 12). Thus, the evidence presented does not demonstrate a change in Armenia that is material to the respondent's (b) (6) claim, and the motion therefore does not fall within this exception to the motion time limitation. See (b) (6) (9th Cir. 2008) (alien must establish a (b) (6), as well as a prima facie case for the underlying substantive relief sought in order to prevail on a motion to reopen); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (alien must satisfy heavy burden of establishing that if the proceedings were reopened the new evidence would likely change the result in the case).

Additionally, the respondent has not shown an "exceptional situation" that would warrant the Board's exercise of its discretion to reopen these proceedings sua sponte particularly given the respondent's criminal history. *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (stating that "as a general matter, we invoke our sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations"); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (the rules governing motions are not meant to cure filing defects or to otherwise circumvent the regulations where enforcing them might cause hardship). Accordingly, the motion will be denied.

ORDER: The motion is denied.

FURTHER ORDER: The request for a stay is denied as moot.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

SEP 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Stanley R. Cygan, Esquire

APPLICATION: Reopening

This case was last before us on October 3, 2011, when we denied the respondent's prior motion to reopen her removal proceedings. On June 10, 2015, the respondent submitted the instant motion to reopen pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security (DHS) has not responded to the motion. The motion exceeds both the time and number limitations for motions to reopen, and it will be denied.

An alien may file only one motion to reopen and, with certain exceptions, it shall be filed within 90 days of the date of entry of a final administrative order. *See* 8 C.F.R. § 1003.2(c)(2); section 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A) and (C)(i). There is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for (b) (6)

(b) (6) the country of nationality or the country to which deportation or removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* (b) (6)

(b) (6) (BIA 1999). However, the respondent has not demonstrated that the exception applies to this motion.

The respondent is a native and citizen of China. She applied for (b) (6)

(b) (6) and (b) (6) the United States. She previously sought reopening to apply for (b) (6), and to submit additional evidence for her claim based on (b) (6). She now seeks reopening to apply for (b) (6) and a claim of (b) (6) in China.

She offers her (b) (6) application, affidavits, and notice to appear, our prior orders, the Immigration Judge's decisions, a referral notice from the DHS, decisions of the United States Courts of Appeal for the Second and Third Circuits, photographs, and media reports.

(b) (6)

The respondent reports that her (b) (6) since 2011. See Exhibit B(2), § III. She claims that (b) (6) in China would apply to her due to a (b) (6) | | to China. *Id.* She states her evidence proves that numerous (b) (6) in China. *Id.*

The instant case arises in the jurisdiction of the Second Circuit, and we decline to apply the decisions that the respondent offers and cites from outside of the Second Circuit. We will deny the respondent's motion because she has not demonstrated (b) (6) in China to warrant an exception to the time and number limitations for motions to reopen, and she has not established her prima facie eligibility for relief. See *Matter of S-Y-G-*, *supra* (a motion to reopen (b) (6) must also demonstrate that the applicant is prima facie eligible for the requested relief).

The evidence is not sufficient to demonstrate a (b) (6) in China since the time of the respondent's hearing in 2008. The evidence reflects that since 2006, there have been (b) (6). See Exhibit E at 88-92. It is inadequate to show a (b) (6) in the United States who return to China. See (b) (6) 2d Cir. 2012); generally (b) (6) (2d Cir. 2008); (b) (6) (2d Cir. 2006).

The burden of proof on a motion to reopen is on the alien to establish eligibility for the requested relief. See *Shao v. Mukasey*, *supra*. The evidence is not sufficient to demonstrate that that the respondent in this case (b) (6) because her evidence is inadequate to show that the (b) (6) in the United States, and does not establish (b) (6). See Exhibits D and E; (b) (6) (2d Cir. 2013); (b) (6).

The respondent has not made a prima facie showing that (b) (6) upon her return because her evidence does not indicate a (b) (6). See (b) (6). The media reports regarding (b) (6) are insufficient to support the respondent's claim that (b) (6) upon her return to China. See Exhibits D and E.

We conclude that the respondent has not met the requirements of section (b) (6) of the Act. Her evidence is insufficient to establish a (b) (6) "arising in the country of nationality" so as to create an exception to the time and number limitations for filing another late motion to reopen. See (b) (6) (2d Cir. 2005); (b) (6).

(b) (6)

(b) (6) (BIA 2006); (b) (6) She has not met her burden of proving that her removal proceedings should be reopened. See *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Accordingly, as the motion exceeds both the time and number limitations for motions to reopen, it will be denied.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

APR 28 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Armin A. Skalmowski, Esquire

APPLICATION: Reopening; reissuance

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen proceedings and remand the record to an Immigration Judge to have him reissue his May 27, 2008, decision¹ and August 6, 2008, decision. In our June 22, 2010, decision we dismissed her appeal from the Immigration Judge's August 6, 2008, decision which denied her motion to reopen. The record before us does not contain a response from the DHS. The motion will be denied.

The respondent's motion to reopen filed in March of 2016 is untimely and number barred. She alleges ineffective assistance of former counsels. In *Matter of Compean, Bangaly, & J-E-C*, 25 I&N Dec. 1 (A.G. 2009), *vacating* 24 I&N Dec. 710 (A.G. 2009), the Attorney General directed the Board to continue to apply the previously established standards for reviewing motions to reopen based on claims of ineffective assistance of counsel (pending the outcome of a rulemaking process).

The respondent meets the requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), to properly allege ineffective assistance of former counsels. However, she does not show the required prejudice. See *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) (the alien must make a prima facie showing that he would have been eligible for the relief sought and that he could have made a strong showing in support of his application).

In our June 22, 2010, decision we held that the new documents submitted – the response of (b) (6) in the respondent's hometown in Fujian Province, China, to an inquiry regarding her situation, and her mother's letter from Fujian Province (Motion to Reopen filed in June of 2008, Exhs. 13, 14) – would not likely change the result in the case due to the deficiencies in the documents. The United States Court of Appeals for the Second Circuit in its (b) (6), 2010, decision dismissed the respondent's petition for review (Present Motion to Reopen, Exh. B at 17C). The respondent now alleges ineffective assistance of additional former counsels – one for the appeal to the Board, and one for the petition for review. However, no new documents concerning the merits of the respondent's claims for (b) (6).

¹ In the Immigration Judge's May 27, 2008, decision he denied the Department of Homeland Security's ("DHS") motion to reconsider his March 20, 2008, decision which found the respondent removable and denied her applications for (b) (6).

(b) (6) are presented. The respondent does not show prejudice from any claimed ineffective assistance of former counsels.

The respondent does not show due diligence. *See Rashid v. Mukasey*, 533 F.3d 127, 132-33 (2d Cir. 2008) (an alien must demonstrate that he or she has exercised due diligence during the entire period he or she seeks to toll). The Second Circuit issued the mandate in the respondent's case on (b) (6) 2010.

The respondent states in her January 15, 2016, declaration that a prior attorney told her that there was nothing more that she could do to reopen her case, and that her case was finally over (Present Motion to Reopen Exh.). Although it was reasonable for the respondent to rely on that "advice" for a while, at some point in time it would have been reasonable for the respondent to seek other counsel. *See Rashid v. Mukasey, supra*, at 132 n.3 (the court has recognized that even an alien who is unfamiliar with the technicalities of immigration law can, under certain circumstances, be expected to comprehend that he has received ineffective assistance without being explicitly told so by an attorney). The respondent did not seek new counsel until (b) (6) of 2015. She does not show due diligence. In sum, the respondent's ineffective assistance claims do not succeed because she does not show prejudice and due diligence.

The respondent does not present an exceptional situation which would warrant sua sponte reopening. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). As discussed above, the respondent does not show prejudice and due diligence. She also does not show prima facie eligibility for any other form of relief. We conclude that there is no exceptional situation for sua sponte reopening. *Matter of J-J-, supra*.

Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied as untimely and number barred.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) -- San Francisco, CA

Date: SEP 18 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lien Lac Uy, Esquire

ON BEHALF OF DHS: Stephen A. Johnston
Senior Attorney

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: (b) (6)

This case was last before the Board on June 30, 2011, when we sustained the Department of Homeland Security's (DHS) appeal, and vacated the Immigration Judge's decision to grant the respondent's application for (b) (6)

(b) (6).¹ On January 27, 2015, the United States Court of Appeals for the Ninth Circuit granted the government's unopposed motion to remand to the Board so that we may consider the impact, if any, of *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012), on our decision vacating the Immigration Judge's grant of deferral of removal. On remand, the DHS has requested that the Board reaffirm its prior decision to vacate the Immigration Judge's grant of (b) (6)

(b) (6). The respondent did not file a brief on remand. Upon reconsideration, we will again vacate the Immigration Judge's decision to grant the respondent (b) (6)
(b) (6).

The respondent's application for (b) (6) is governed by the amendments of the REAL ID Act. See (b) (6) (BIA 2006). We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met their relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). Consistent with *Ridore v. Holder*, *supra*,

¹ The Immigration Judge denied the respondent's applications for (b) (6)
(b) (6) under the Immigration and Nationality Act ("Act"), pursuant to sections (b) (6)
(b) (6) as statutorily barred. These applications for relief from removal are not before us on remand.

the Board recently held in *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015), that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review, overruling *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), and *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008), to the extent that they held otherwise. While the Board concluded that the underlying factual findings of the Immigration Judge will be accepted unless they are clearly erroneous, whether or not the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal will be reviewed de novo. *Matter of Z-Z-O-*, *supra*, at 591.

The Immigration Judge found the respondent credible and credited his testimony that he

(b) (6) to
(b) (6) and that a (b) (6)
(I.J. at 6, 11-13 (December 13, 2007); I.J. at 8-9 (August 14, 2009)). The Immigration Judge concluded that these facts, viewed along with the background country evidence, established that the respondent would (b) (6)
(I.J. at 9-10 (August 9, 2009)).

Applying the standards of review in *Ridore v. Holder*, *supra*, and *Matter of Z-Z-O-*, *supra*, to the instant case, we again must vacate the Immigration Judge's decision to grant the respondent (b) (6). As noted in our prior decision, the Immigration Judge clearly erred in finding that the respondent testified that a co-worker, similarly situated to him, was (b) (6) in China (I.J. at 8-9 (August 14, 2009)). Rather, the respondent testified that workers who do not perform their duties in an attempt to (b) (6) are "purposely (b) (6) and not let . . . go" (Tr. at 95-96). As an example, the respondent noted a (b) (6), the respondent noting that (b) (6) if one's actions were perceived to be done for the purpose of (b) (6) (Tr. at 96). Contrary to the Immigration Judge's finding, the respondent did not provide any testimony that his (b) (6) or for any other reason (I.J. at 8-9 (August 14, 2009)). The Immigration Judge significantly relied on this clearly erroneous finding in concluding that the respondent satisfied his burden of showing a (b) (6) in China, as required for (b) (6) (I.J. at 8-9 (August 14, 2009)).

The Immigration Judge also clearly erred in finding that the summons received by the respondent ordered him "to appear or face danger" (I.J. at 8 (August 14, 2009)). The notices from (b) (6) according to the law" (Exh. 5). The Immigration Judge's finding that the respondent would (b) (6) and (b) (6) as a result of his (b) (6) is unsupported by objective record evidence showing that (b) (6) like the respondent

(b) (6)

(b) (6) as defined by the regulations in (b) (6) (9th Cir. 2001) (“(b) (6)”) (citing (b) (6)). While the respondent expressed his (b) (6) that he will be (b) (6) there is no objective record evidence showing that (b) (6) are in fact (b) (6) in China, and, further, that (b) (6). See (b) (6) (9th Cir. 2010) (finding that (b) (6), and noting that there is no subjective component to an applicant’s (b) (6)). We disagree with the respondent’s assertion on appeal that he is (b) (6) to (b) (6), a “(b) (6)” and “(b) (6),” who is reported to have been (b) (6) is a known (b) (6) unlike the respondent (Exhs. 6, 11). While the background country reports in the record indicate that “(b) (6),” it did not otherwise indicate whether the respondent’s particular (b) (6) and to what degree (Exh. 7: Appendix A).

The Immigration Judge’s determination that the respondent has established his eligibility for (b) (6) significantly relied upon clearly erroneous factual findings. The record does not support the conclusion that the respondent has demonstrated that each step of the hypothetical chain of events is more likely than not to occur, and that the entire chain will come together to result in the (b) (6) of the respondent in particular. (b) (6) (BIA 2006). While the background country evidence indicates that the Chinese (b) (6), it does not adequately establish that the respondent himself would (b) (6) upon returning to China. (b) (6) (9th Cir. 2008); see, e.g., (b) (6) (9th Cir. 2009) (affirming denial of (b) (6) against (b) (6), applicant did not provide evidence that he is (b) (6)).

Accordingly, we conclude that the Immigration Judge clearly erred in finding that (b) (6) upon his return to China, and the respondent did not establish his eligibility for (b) (6). See (b) (6). In view of the foregoing discussion, we will again vacate the Immigration Judge’s decision granting the respondent’s application for (b) (6). The following order shall be entered.

ORDER: The Immigration Judge’s decision granting the respondent’s application for (b) (6) is vacated.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Seattle, WA

Date: APR 11 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elaine R. Fordyce, Esquire

ON BEHALF OF DHS: Margaret LaDow
Assistant Chief Counsel

APPLICATION: Reopening; emergency stay of removal

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to reapply for (b) (6). In our July 29, 2013, decision we dismissed his appeal from the Immigration Judge's July 9, 2012, decision which found him removable, determined that his (b) (6) application was time-barred, and denied his applications for (b) (6). The Department of Homeland Security opposes the motion. The motion will be denied.

The respondent's motion to reopen filed in February of 2016 is untimely. He does not show (b) (6) in El Salvador which are material to his (b) (6) claims.

The respondent presents evidence that in (b) (6) of 2014 his younger daughter and her cousin were (b) (6). The (b) (6) the respondent's daughter and her cousin because (b) (6) (Motion Exhs. at 38-46). Although (b) (6) has to be at least (b) (6). (b) (6). See (b) (6) (9th Cir. 2013) (in the context of (b) (6), the court believes that the (b) (6) may matter the most).

The respondent presents evidence that his younger daughter's maternal uncle (b) (6) (Motion Exhs. at 38-46). (b) (6) may in some circumstances constitute (b) (6). See (b) (6) (9th Cir. 1997), *amended*, (b) (6) (9th Cir. 1998) (the alien's (b) (6), and only after he made clear that his (b) (6) of that

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anna A. Darbinian, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6)

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's July 8, 2015, decision denying his applications for (b) (6) pursuant to sections (b) (6) of the Immigration and Nationality Act, 8 (b) (6), and his request for (b) (6). The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). See also *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

The respondent's claim is based (b) (6) in Guatemala. He testified that he had two uncles who worked for (b) (6) in the 1990's through the early 2000's, (b) (6), and that (b) (6) those (b) (6) the respondent's family (I.J. at 2; Tr. at 50). In 1992, (b) (6) uncles (b) (6); the respondent and his family believe that (b) (6) (I.J. at 2; Tr. at 50-51, 55). In 1999, his family moved to (b) (6), but (b) (6), (b) (6), and (b) (6) (I.J. at 3; Tr. at 57-59).

In 2001, the respondent's cousin and one of his friends tried (b) (6) (I.J. at 2; Tr. at 62). The respondent (b) (6), and his cousin (b) (6) (I.J. at 2; Tr. at 62). At the end of 2001, the respondent moved to Guatemala City to (b) (6) (I.J. at 2; Tr. at 63-64). In (b) (6) 2002, the respondent was (b) (6) (I.J. at 2; Tr. at 67). The respondent testified that (b) (6) the respondent was, and (b) (6) stated that the respondent was (b) (6) (I.J. at 2; Tr. at 67). The respondent was (b) (6)

(b) (6)

(b) (6) (I.J. at 2-3; Tr. at 67-69). The respondent testified that he was (b) (6), and that (b) (6) (I.J. at 3; Tr. at 69). The respondent did not (b) (6), but testified that he (b) (6) (I.J. at 3; Tr. at 76). The respondent alleges that these (b) (6) to his (b) (6) his uncles, who w (b) (6).

We agree with the Immigration Judge's determination that the respondent is ineligible for (b) (6) based upon a failure to file (b) (6) as the respondent was unable to establish (b) (6) in Guatemala affecting his eligibility or (b) (6) an application (I.J. at 6-9); section (b) (6) of the Act, (b) (6). We find no clear error in the Immigration Judge's findings of facts related to the issue of whether the respondent has sufficiently established that he suffers from PTSD so as to establish "(b) (6) sufficient to (b) (6) his (b) (6) application. The burden of proof is on the respondent to show that "any disability was directly related to the (b) (6) within the statutory period." See (b) (6) (BIA 2002). The respondent in this case did not do so. Accepting the respondent's entry date of 2004, based on his testimony and (b) (6) application, which was found credible by the Immigration Judge, he did not file (b) (6) application until November 2012, almost 8 years after his last date of entry. While the respondent claims that he was (b) (6) when he entered the United States to (b) (6) his application, the only evidence that he (b) (6) since arriving in the United States, were (b) (6) indicating (b) (6) in 2013 when he (b) (6), and a 2014 (b) (6) when he was (b) (6) (I.J. at 7).

Further, while the respondent submitted a 2014 psychological evaluation from a clinical psychologist, who concluded that the respondent suffered from PTSD which (b) (6) to (b) (6) application, we agree with the Immigration Judge's determination to afford this evaluation little weight (I.J. at 7; Exh. 5, at 20). As indicated by the Immigration Judge, the respondent did not see a psychologist until ten years after his arrival in the United States (I.J. at 7). In addition, the psychologist met with the respondent on only one occasion for four hours, just weeks before his February 24, 2014, hearing date, and the evaluation was rendered only for the apparent purpose of addressing the (b) (6) of the respondent's (b) (6) application, with no follow up by the evaluating psychologist or other medical care professional (I.J. at 8). As also observed by the Immigration Judge, the respondent's claimed mental condition has not (b) (6) (I.J. at 8). There is no indication in the record to show that the respondent was (b) (6) or that he was (b) (6). Based on this record, we do not find clear error in the Immigration Judge's determination that the respondent did not submit sufficient evidence to establish that his (b) (6) directly relates to (b) (6) application within the (b) (6) after his arrival in 2004. See (b) (6).

The Immigration Judge also pointed out that this proposed scenario, that the respondent was so (b) (6) in Guatemala that he could not (b) (6) application, is

(b) (6)

contradicted by his other claim of (b) (6), i.e., that he became too “discouraged” to pursue his application after contacting three notaries and two attorneys, and being told his case was complicated and would be expensive to pursue (I.J. at 7). As noted by the Immigration Judge, if the respondent was too (b) (6) an application upon his arrival, that (b) (6) him from contacting any attorneys or notaries when he arrived in the United States (I.J. at 8).

The record also supports the Immigration Judge’s determination that the respondent failed to meet his burden in establishing (b) (6) so as to allow him to file his (b) (6) application (b) (6) (I.J. at 9). The respondent claims that (b) (6) of his cousin in (b) (6) 2012, (b) (6) 2012, (b) (6) which (b) (6) him to “(b) (6),” and that he (b) (6) (Respondent’s Br. at 24). However, we agree with the Immigration Judge that (b) (6) in Guatemala alleged by the respondent are merely a continuation of the underlying basis of what he claims (b) (6) from Guatemala in 2004, not (b) (6) (I.J. at 9).

The respondent remains eligible for (b) (6) under the Act. We find no clear error in the Immigration Judge’s denial of (b) (6) based on her findings that the respondent did not establish a sufficient (b) (6) in Guatemala,” or (b) (6) (Respondent’s Br. at 26-34). We acknowledge that (b) (6). See (b) (6) (9th Cir. 2015) (“(b) (6)”; (b) (6) (BIA 2014) (citing with approval prior decisions finding (b) (6)). However, the respondent has not established that (b) (6) in Guatemala, was or would be a (b) (6) in Guatemala. Specifically, as there is a lack of objective evidence connecting (b) (6) the respondent’s family (b) (6) the respondent, there is inadequate support here to conclude that the respondent (b) (6).¹

That is, even if (b) (6) in Guatemala were (b) (6), the record lacks evidence to show that it was (b) (6). As observed by the Immigration Judge, (b) (6) (b) (6), with no allegation by the respondent that the (b) (6) (I.J. at 10; Tr. at 134). The only testimony offered by the respondent to substantiate that he was (b) (6) because of (b) (6)

¹ (b) (6) also serves as an alternative basis to deny the respondent’s (b) (6) claim.

(b) (6)

(b) (6), in which a (b) (6) for his (b) (6) because of (b) (6). As also observed by the Immigration Judge, the testimony offered about that (b) (6) raised questions about the (b) (6) for his (b) (6) than (b) (6) (I.J. at 12; Tr. at 67). As pointed out by the Immigration Judge, if the respondent was actually (b) (6) would have been insufficient and the respondent would not have (b) (6) (I.J. at 12). Additionally, according to the respondent's own testimony, (b) (6) (b) (6), undermining his claim that he was (b) (6) because (b) (6) (Tr. at 67).

We agree with the Immigration Judge that the respondent has not put forth evidence demonstrating that (b) (6) or because of (b) (6) (I.J. at 11). Rather, the respondent has introduced evidence demonstrating that (b) (6) to the (b) (6) Guatemala, and, as pointed out by the Immigration Judge, some of that evidence raises an inference that some (b) (6) themselves (I.J. at 11). See (b) (6) (9th Cir. 2010) (stating, "[a]n alien's desire to be (b) (6) bears no (b) (6)"); (b) (6) (noting that (b) (6) is not available to (b) (6) under the Act). For example, one news article submitted by the respondent mentions (b) (6) in conjunction with (b) (6) (I.J. at 11; Exh. 4, at 35). The Immigration Judge further observed that the respondent's testimony about (b) (6) in 2012, in which (b) (6) raised an inference that it was the result of (b) (6), with no indication (b) (6) (I.J. at 11; Tr. at 124-25, 133). While the respondent testified (b) (6), as observed by the Immigration Judge the respondent's testimony with regard to the (b) (6) was inconsistent, and while he was able to produce (b) (6), he failed to produce copies of these (b) (6) that would substantiate his claim of (b) (6) (I.J. at 5-6; 11; Tr. at 131-33). In addition, the fact that the respondent's (b) (6), consisting of (b) (6) from any consistent source undermines a conclusion that the (b) (6) by the respondent or his extended family members. See (b) (6) (BIA 2007).

Accordingly, we find that the respondent did not establish that (b) (6) in Guatemala, would be a (b) (6) in Guatemala. The record also supports the Immigration Judge's determination that (b) (6) does not constitute a valid (b) (6) (I.J. at 12). Contrary to the respondent's argument on appeal, the respondent's (b) (6)

(b) (6)

(Respondent's Br. at 33-34). The group is (b) (6) and (b) (6). See (b) (6) (BIA 2014). As described, (b) (6) could (b) (6). See, e.g., (b) (6) (BIA 2007) (holding that (b) (6)). In addition, the respondent has not shown that (b) (6), as there is nothing in the record that shows that (b) (6). *Id.* (b) (6) (9th Cir. 2008) (finding that (b) (6)).

The record also supports the Immigration Judge's determination that the respondent did not demonstrate that the Guatemalan (b) (6) (I.J. at 13). As observed by the Immigration Judge, the respondent submitted news articles about (b) (6) the (b) (6) and the respondent testified that (b) (6) (I.J. at 13). Based on the foregoing we find that the respondent did not establish eligibility for (b) (6) under section (b) (6) of the Act.

Finally, we conclude that the Immigration Judge did not clearly err in finding that the respondent has not demonstrated that (b) (6) (I.J. at 15-17). See (b) (6) (9th Cir. 2012) (ruling that the Board reviews under the "clearly erroneous" standard the Immigration Judge's determinations regarding likelihood of future events, for purposes of eligibility for relief under (b) (6)); (b) (6) (9th Cir. 2014). Evidence that (b) (6) in Guatemala is insufficient to demonstrate that (b) (6) of the respondent. The respondent has not presented any persuasive arguments on appeal that would cause us to reverse the Immigration Judge's denial of his application for (b) (6) (Respondent's Br. at 42-45). We therefore affirm the Immigration Judge's decision denying the respondent's application for (b) (6).

The following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date:

FEB 12 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jeffrey M. Okun, Esquire

APPLICATION: Reopening

ORDER:

The respondent's timely filed motion is denied. Notwithstanding the alleged ineffective assistance of counsel claim, the respondent has not sufficiently shown patent error or prejudice resulting from the alleged deficient performance. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988); *Rabiu v. INS*, 41 F.3d 879 882 (2d Cir. 1994). Aside from other matters, the evidence proffered along with the pending motion does not sufficiently (a) address the Immigration Judge's concerns over the respondent's and her witness's credibility; (b) demonstrate the respondent's statutory eligibility for adjustment of status, i.e., either that she was inspected and admitted or that she is a beneficiary of an approved visa petition that was filed on or before April 30, 2001; (c) demonstrate that the respondent possesses the requisite 10 years of continuous physical presence for purposes of demonstrating her eligibility for cancellation of removal; (d) establish an exception to the 1-year filing deadline for purposes of demonstrating the respondent's eligibility for asylum; or (e) make a prima facie showing that the respondent would (b) (6) as that term is defined by regulation. See (b) (6). The respondent has not presented persuasive arguments that consideration of the proffered evidence, and further claims relating to her asserted eligibility for the abovementioned forms of relief.

On this record, the respondent has not sufficiently demonstrated that further hearings are warranted. Nor has he identified an exceptional situation that would warrant reconsideration of the prior Board decisions in this case or reopening of these proceedings under the Board's discretionary sua sponte authority. Accordingly, the respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date:

JAN - 5 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Eduardo A. Masferrer, Esquire

APPLICATION: Administrative closure

The respondent, a native and citizen of El Salvador, has appealed from the Immigration Judge's decision, dated June 12, 2015, pretermining his application for suspension of deportation under former section 244 of the Immigration and Nationality Act, and granting him voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c. The Department of Homeland Security (DHS) did not file a brief in opposition to the appeal. During pendency of the appeal, the respondent filed a motion to administratively close his proceedings. The respondent's appeal will be dismissed and his motion denied.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. See 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The respondent argues on appeal that the Immigration Judge erred in failing to consider impermissible retroactivity when he determined that the respondent was not eligible for suspension of deportation under former section 244 of the Act (Respondent's Brief at 5). The respondent entered the United States without inspection in 1989 and approximately 3 years later was convicted of assault with intent to murder in 1992 (I.J. at 1-2). The DHS initiated removal proceedings against the respondent through service of a Notice to Appear in 2012 (Exh. 1). The law has significantly changed since the time the respondent entered the United States and the time when he acquired his conviction; for example, suspension of deportation was eliminated and replaced with the more restrictive cancellation of removal under section 240A of the Act, 8 U.S.C. § 1229b, pursuant to Congress's enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009, 3546. See *Costa v. I.N.S.*, 233 F.3d 31, 33 (1st Cir. 2000). Suspension of deportation is not available to those placed in removal proceedings after the enactment date of IIRIRA. *Id.* However, contrary to the respondent's argument on appeal, there is no impermissible retroactivity problem when considering the respondent's eligibility for suspension of deportation. The respondent could not have detrimentally relied upon the availability of suspension of deportation at the time of his 1992 conviction as he was not eligible for that relief then. *Cf. Sr Cyr v. I.N.S.*, 533 U.S. 289 (2001) (finding pre-IIRIRA waiver under former section 212(c) of the Act should still be available to those who detrimentally relied upon the availability of the waiver at the time of a conviction). To have been eligible for suspension of deportation, the respondent must have accrued 10 years of continuous physical presence in the United States after commission of the crime that rendered him deportable; thus the respondent was not eligible for suspension of deportation at the time of his conviction, but would have had to accrue ten more years in the

United States after the conviction. See 8 C.F.R. § 1240.65(c)(1). IIRIRA eliminated suspension of deportation only 5 years after the respondent committed his crime. Thus, the respondent is not eligible to apply for suspension of deportation as he is in removal proceedings; there is no issue of impermissible retroactivity in that determination as the respondent was never eligible for suspension of deportation.

The respondent seeks administrative closure of his proceedings, stating through counsel that he is currently being held without bail in state custody upon being transferred out of the custody of Immigration and Customs Enforcement (ICE). In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) we found that, in determining whether administrative closure of proceedings is appropriate, an Immigration Judge or this Board should weigh all relevant factors including, but not limited to (1) the reason administrative closure is sought, (2) the basis for any opposition to administrative closure, (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings, (4) the anticipated duration of the closure, (5) the responsibility of either party, if any, in contributing to any current or anticipated delay, and (6) the ultimate outcome of removal proceedings when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board. We note that the DHS has not filed an opposition to the request for administrative closure; however, we find that administrative closure is not appropriate in this case. The respondent has not explained why being in state custody would necessitate administrative closure of his immigration proceedings. Additionally, the respondent has offered no information regarding the anticipated duration of the closure or what the impact the respondent's criminal matter may have on his immigration proceedings. Accordingly, we do not find administrative closure would be appropriate in this case.

Effective January 20, 2009, an Immigration Judge who grants an alien voluntary departure must advise the alien that proof of posting of a bond with the DHS must be submitted to the Board of Immigration Appeals within 30 days of filing an appeal, and that the Board will not reinstate a period of voluntary departure in its final order unless the alien has timely submitted sufficient proof that the required bond has been posted. 8 C.F.R. § 1240.26(c)(3). See *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). The Immigration Judge provided the respondent with the required advisals and granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a \$500.00 bond. The record before the Board, however, does not reflect that the respondent submitted timely proof of having paid that bond. Therefore, the voluntary departure period will not be reinstated, and the respondent will be removed from the United States pursuant to the Immigration Judge's alternate order.

In light of the foregoing, the following order will be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 20530

File: (b) (6) – Hartford, CT

Date: SEP - 4 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mike Sethi, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of material fact
(not sustained)

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document
(sustained)

APPLICATION: (b) (6)

This case was last before the Board on March 21, 2014, when we dismissed the respondent's appeal from an Immigration Judge's decision denying her application for (b) (6) under sections (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6), and her request for (b) (6). On (b) (6), 2015, the United States Court of Appeals for the Second Circuit ("Second Circuit") vacated the Board's decision, reopened proceedings, and remanded the case pursuant to the parties' joint stipulation for reconsideration of the respondent's applications. The appeal will be dismissed.

In its order, the Second Circuit remanded the case for reconsideration of whether the respondent's (b) (6) in Guatemala is legally cognizable in light of our intervening precedent in (b) (6) (BIA 2014), and our recent decisions in (b) (6) (BIA 2014), and (b) (6) (BIA 2014). The court noted that the Board should consider the factual findings of the Immigration Judge, including his findings regarding (b) (6), in view of these decisions.

The respondent's (b) (6) application was filed after May 11, 2005 (Exh. 4). Her claim is therefore subject to the statutory amendments made by the REAL ID Act of 2005. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

(b) (6)

We review findings of fact, including credibility determinations and (in the Circuit in which this case arises) determinations as to the likelihood of future events, under the "clearly erroneous" standard. See *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues under a de novo standard. See 8 C.F.R. § 1003.1(d)(3)(ii).

The REAL ID Act has amended the burden of proof for (b) (6) applicants. "To establish that the applicant is a (b) (6) within the meaning of [section (b) (6) of the Act], the applicant must establish that (b) (6)

the applicant." Section (b) (6) of the Act; see also (b) (6) (BIA 2007).

The respondent, a native and citizen of Guatemala, testified that she was (b) (6) in (b) (6) 2006 (I.J. at 2; Exh. 4; Tr. at 27-28, 36-37, 45). She explained that (b) (6), and indicated that she did not (b) (6) (I.J. at 2-4; Exh. 4; Tr. at 29). The respondent next (b) (6) 2010, and explained that (b) (6) (I.J. at 3-4; Exh. 4; Tr. at 29, 43-44). Consequently, she (b) (6) the United States in (b) (6) 2011 (I.J. at 4; Exh. 4; Tr. at 26, 34).

In (b) (6), the Board held that, depending on the facts and evidence in an individual case, "(b) (6)" may constitute (b) (6) that forms the basis of a claim for (b) (6) or (b) (6). An applicant for (b) (6) based on (b) (6)

in question. See (b) (6). To satisfy the (b) (6), a (b) (6). See (b) (6). Social distinction (formerly known as (b) (6)) means that (b) (6) (b) (6)

To demonstrate (b) (6), an applicant must provide evidence showing that (b) (6) ("Although (b) (6) is one that (b) (6)."). In addition to establishing the existence of (b) (6), the applicant for (b) (6) must also (b) (6) (b) (6)

The essence of (b) (6) is that it allows (b) (6) to be accurately described in a sufficiently discrete manner so as to (b) (6). See (b) (6) (2d Cir. 2007). While a (b) (6) does not preclude it from being

(b) (6)

considered a (b) (6), we agree with the Immigration Judge that (b) (6) described by the respondent lacks (b) (6) of the Guatemalan population (I.J. at 6). See (b) (6). Unlike (b) (6) defined in (b) (6), the (b) (6) in this case is not limited by the terms (b) (6). The (b) (6) described by the respondent fails because the (b) (6) is too amorphous (I.J. at 6). Although the background evidence indicates that (b) (6) in Guatemala, the respondent has not established that (b) (6) or (b) (6). (I.J. at 5-6; Exhs. 4, 5). *Id.* Instead, (b) (6) quite distinct from any notions that (b) (6) (I.J. at 6). Accordingly, there is no (b) (6).

Moreover, (b) (6) does not carry any hallmarks of (b) (6), as the respondent has not demonstrated that (b) (6) within Guatemala or are (b) (6) of Guatemala at large (I.J. at 6-7). (b) (6). This case is distinguishable from (b) (6), because it does not (b) (6). Although the respondent was (b) (6) in Guatemala, the Second Circuit has held that the (b) (6) must exist independent of (b) (6) and the (b) (6). See (b) (6) (2d Cir. 1991) (finding that (b) (6) was not, for that reason, (b) (6) purposes).

We agree with the Immigration Judge that, however (b) (6) may be defined, the respondent has not established that (b) (6) (I.J. at 6-7). See (b) (6) (BIA 1985) (holding that (b) (6) requires that (b) (6) sought to overcome"); see also (b) (6) (1992) (finding that (b) (6) of an individual by (b) (6) where (b) (6) to include (b) (6) and wishes to overcome); (b) (6) (2d Cir. 2006) (requiring the applicant to establish a link (b) (6) and (b) (6)); (b) (6) (BIA 2008) (holding that (b) (6) was not established where, inter alia, the (b) (6) (b) (6) (holding that (b) (6) on account of (b) (6) was not established in the absence of evidence that, inter alia, (b) (6) for (b) (6) (b) (6) (BIA 1997); (b) (6) (BIA 1985). Consequently, we conclude that the


(b) (6)

respondent has not established that (b) (6) for (b) (6). See (b) (6) (2d Cir. 2007); (b) (6).

In the absence of (b) (6), the respondent is not entitled to a presumption that she holds a (b) (6). See (b) (6) (BIA 2008). We find no clear error in the Immigration Judge's fact-finding regarding the events the respondent will (b) (6) her return to Guatemala, and agree that there is insufficient evidence that (b) (6) (I.J. at 7). See (b) (6) (holding that an Immigration Judge's predictions regarding the (b) (6) are factual findings entitled to deference under the clearly erroneous standard). Inasmuch as the respondent has not met the burden necessary to establish her eligibility for (b) (6), it follows that she has also not satisfied the (b) (6). See (b) (6) (1984). Finally, we conclude that the respondent has not shown that the Immigration Judge clearly erred in finding insufficient evidence in the record to establish that she faces a (b) (6) by or with (b) (6). See (b) (6). The respondent has offered no persuasive evidence that the Guatemalan (b) (6). Consequently, she has not met her burden of proof to establish (b) (6).

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Saipan, MP

Date: MAR - 2 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mun Su Park, Esquire

APPLICATION: Reopening; stay of removal

On May 14, 2015, the Board upheld an Immigration Judge's decision finding the respondent removable to the Philippines, and denied a motion to remand. According to our records, the respondent attempted to file her first motion to reopen this matter for further proceedings on June 11, 2015. However, that filing was rejected for procedural defects because it was erroneously filed on a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26). The respondent filed the instant pending motion to reopen on November 23, 2015, with an accompanying request for a stay of removal. The motion, to which the Department of Homeland Security (DHS) has not responded, will be denied.

The respondent alleges that reopening is warranted due to the ineffective assistance of former counsel, Pamela Brown Blackburn, Esquire, who represented her on appeal before the Board and who attempted, unsuccessfully, to file her first motion to reopen before the Board. The respondent faults Blackburn for failing to submit an appeal brief challenging the Immigration Judge's decision before we issued our May 14, 2015, decision, and also for not complying with Board procedures in filing the first motion to reopen. The respondent vaguely avers that "without the ineffective assistance of counsel, she could have subsequently been granted for a relief from removal." (Respondent's Combined Motion to Reopen and Motion for Stay at 5).

The respondent further argues that we should reopen and administratively close these proceedings based on her potential eligibility for a (b) (6) before United States Citizenship and Immigration Services (USCIS). (Respondent's Combined Motion to Reopen and Motion for Stay at 6). Finally, she appears to argue that reopening and administrative closure is warranted based on general humanitarian concerns. (*Id.*).

The instant motion is untimely because it was filed more 90 days after the entry of our May 14, 2015, decision. See section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent has failed to demonstrate that any of the statutory or regulatory exceptions to the general 90-day time limitation on motions to reopen apply to her case.

Moreover, even if we were to deem the instant motion timely under the doctrine of equitable tolling, we still would find no basis to reopen these proceedings. See generally *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (holding that equitable tolling will be applied where the

alien is prevented from timely filing a motion by deception, fraud, or error so long as the alien acted with due diligence in discovering the deception, fraud, or error).

To the extent that the respondent seeks reopening based on Blackburn's former actions or inactions, we discern no prejudice, such that reopening of these proceedings would be warranted. See, e.g., *Ortiz v. INS*, 179 F.3d 1148, 153 (9th Cir. 1999) (finding that prejudice must be shown for a due process challenge and that prejudice is found when the performance of counsel was so inadequate that it may have affected outcome); see also *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (an alien can show prejudice where counsel's performance "may have affected the outcome of the proceedings").

In *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003), the Ninth Circuit held that an alien failed to show prejudice when he could not "show that his admissibility arguments might have been successful on appeal to the BIA." Since prejudice had not been shown, the court rejected an ineffective assistance of counsel claim in that case and upheld the Board's summary dismissal of the appeal even though counsel failed to file a brief or statement of reasons for the appeal.¹

Here, like the alien in *Rojas-Garcia*, the respondent has not meaningfully shown that, had Blackburn filed an appeal brief from the Immigration Judge's decision, the outcome of the proceedings may have been different. The respondent's motion, which does not include a proposed appellate brief or offer the arguments that would be contained in a brief, does not persuade the Board that the Immigration Judge's decision was incorrect or could have been overturned on appeal if Blackburn had filed a brief. It also fails to show that the respondent could establish that she is not removable, or that she is eligible for any relief from removal, in a reopened hearing.

Moreover, the respondent has not shown that she sustained prejudice from Blackburn's misfiling of her first motion to reopen. While Blackburn erroneously submitted that filing, the respondent has not shown that any proper filing of that motion may have resulted in the reopening of these proceedings.

In view of the foregoing, we find no basis to reopen these proceedings based on an any alleged ineffective assistance of former counsel. We also decline to reopen and administratively close these proceedings. Administrative closure is an administrative convenience that removes cases from the calendar and does not result in a final order. See *Matter of Avetisyan*, 25 I&N

¹ The *Rojas-Garcia* decision distinguished *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000), in which the court recognized an ineffective assistance of counsel claim where the alien's attorney failed to file a timely notice of appeal, resulting in summary dismissal of the appeal. *Dearinger* found a rebuttable presumption of prejudice, acknowledging that the alien was required to demonstrate a "plausible ground for relief to justify reopening for ineffective assistance of counsel. *Id.* at 1046. The alien met that standard.

Dec. 688 (BIA 2012); *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990). Because a final removal order has already been entered in this case, administrative closure is not appropriate.²

Finally, we do not find exceptional circumstances that would warrant reopening pursuant to our discretionary *sua sponte* authority under 8 C.F.R. § 1003.2(a). See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Accordingly, the following orders will be entered.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of removal is denied as moot.



FOR THE BOARD

² We further note that if the respondent receives an approved (b) (6) from USCIS, she may file a motion to reopen seeking to terminate removal proceedings under 8 C.F.R. § 214.14(c)(5)(i). Moreover, any request for the favorable exercise of prosecutorial discretion or for general humanitarian relief from removal should be raised directly with the DHS.

Falls Church, Virginia 22041

File: (b) (6) – West Valley, UT

Date:

FEB 17 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nathan Jeppsen, Esquire

APPLICATION: Continuance

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's decision dated May 6, 2015. The appeal will be dismissed. The respondent's request for oral argument is denied. See 8 C.F.R. § 1003.1(e)(7).

We review the findings of fact made by the Immigration Judge, including the questions of credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

At a hearing on January 4, 2012, the respondent indicated that she intended to file an application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), and that Form I-130 a visa petition will also be filed on her behalf (Tr. at 13-14). Upon the Immigration Judge's instruction, the respondent received a copy of the Department of Homeland Security (DHS) biometric instructions (I.J. at 2; Tr. at 16; Exh. 2). The Immigration Judge directly instructed the respondent:

You are required to comply with all the biometric notice, including where you file your application, how you file your application . . . and, more importantly to the court, you have to have your fingerprints taken, so they're current within 15 months of your individual hearing, and no later than 90 days before your individual hearing. If you fail to do any of the above, I will find that you've abandoned relief under the Act, dismiss your application for failure to prosecute, unless you can prove to the court that it was through no fault of your own that you failed to comply with my order. Do you understand? [Tr. at 16.]

The respondent has admitted, and does not deny, that she understood these instructions (I.J. at 2; Tr. at 39).¹ The respondent thereafter had two master hearings, on January 25, 2012, and April 18, 2012, during which she submitted her application for cancellation of removal, along

¹ We note that the respondent has lived in this country since she was (b) (6) years of age and speaks English (Tr. at 34), and she has been represented by the same counsel throughout these proceedings.

with documents showing that her biometrics were taken in January 2012 (Exh. 3). The respondent's individual hearing was set for April 3, 2014 (Tr. at 32). Subsequently, on November 10, 2013, the Immigration Court sent a Notice of Hearing both to the respondent and her counsel, advising that the individual hearing was rescheduled to May 6, 2015.²

When respondent appeared with her counsel at the May 6, 2015, hearing, however, the respondent had not have her biometrics taken since 2012, thus her last biometrics were not taken within 15 months of the hearing as instructed by the Immigration Judge (Tr. at 35, 37).³ Counsel explained that the respondent's case was "continued out a year and I think that ended up being an oversight because my client separated from her husband during that period of time and moved" and had other difficulties in her personal life (Tr. at 38). Counsel argued that the difficulties in the respondent's personal life and her confusion constituted "good cause" for continuance of her case (Tr. at 43-44). The respondent stated, as a reason for not having the biometrics updated, "I thought I was going to receive a letter of some sort like I did the first time . . . like a date for me to . . . show up for the biometrics" (Tr. at 45). The Immigration Judge pointed out that the instructions stated that the alien would receive an appointment to visit the application support center by taking the first step of sending something to the Service Center, and the Immigration Judge never stated to her that there would be some type of automatically generated renewal notice (Tr. at 45). The Immigration Judge therefore deemed the respondent's application for relief abandoned. The Immigration Judge found that the respondent did not show "good cause" for a further continuance, and ordered her removed (I.J. at 7).

On appeal, the respondent argues that the Immigration Judge erred in finding that the respondent's application for cancellation of removal was abandoned based on her failure to have the biometrics updated. The respondent also argues that the Immigration Judge erred in denying a further continuance.

The respondent argues that she misunderstood the Immigration Judge's instructions at the January 4, 2012, hearing and believed that, after the initial fingerprinting, the DHS would schedule any additional fingerprinting by sending her a new biometrics packet (Resp. App. Brief, at 1). She also argues that this oversight was due to the problems she experienced in her personal life (*id.*).

Even if we were to accept that the respondent in fact believed that, after she complied with her initial biometrics, she would receive further instructions and a new packet, the respondent fails to explain the basis of such belief, or which part of the Immigration Judge's January 4, 2012, instructions would cause her to form such a belief. As noted above, the Immigration Judge clearly stated that the respondent should ensure that her fingerprinting was done within 15

² The brief refers to the May 6, 2015, hearing as a master hearing (*see, e.g.*, Resp. App. Brief, at 1). However, as the counsel acknowledged, the May 6, 2015, hearing was an individual hearing, and was clearly noted as an individual hearing on the Notice of Hearing (Tr. at 38-39).

³ The respondent's case was assigned to a different Immigration Judge at her individual hearing after a change of venue. However, this will not affect our decision.

months, but no later than 90 days, before her individual hearing date (Tr. at 16). The biometric instructions received by the respondent, a copy of which has been included in the record, stated that, "After the 5 items [i.e., application form, fee, etc.] are received at the USCIS Texas Service Center, you will receive" a fee receipt notice and a USCIS notice with instructions to appear for an appointment (Exh. 2). Therefore, the instructions showed that the respondent had to initiate the process by filing an application and other documents, and did not state that she would automatically receive a renewal packet. The respondent in fact complied with these instructions by filing the application and other required documents, and completed her initial biometrics in January 2012. The respondent has not explained on what basis she would form a belief that she would receive a renewal notice. While we are sympathetic to the personal and marital difficulties the respondent experienced since her 2011 marriage, they are not sufficient reasons for not complying with the Immigration Judge's explicit instructions to keep the biometrics updated.

The respondent also relies on *Matter of D-M-C-P-*, 26 I&N Dec. 644 (BIA 2015), and argues that the Immigration Judge erred as a matter of law in finding that the respondent abandoned her relief. In that case, the Board held that it is improper to deem an application for relief abandoned based on the applicant's failure to comply with the biometrics filing requirement where the record does not reflect that the applicant received notification advisories concerning that requirement, was given a deadline for submitting the biometrics, and was advised of the consequences of his or her failure to comply. *Id.* at 647-50; *see also* 8 C.F.R. §1003.47.

However, in this case the Immigration Judge did provide, as noted above, notification advisories concerning the biometrics filing requirement, including the need to keep the biometrics updated, as stated in *Matter of D-M-C-P-* (Tr. at 16). Contrary to the respondent's suggestion, neither *Matter of D-M-C-P-* nor the regulation requires that the Immigration Judge or the DHS ensure that the biometrics are updated, by sending further notifications or a new date for biometrics (Resp. App. Brief, at 8). Rather, as provided in the instructions for the biometrics, a date would be set up after an alien files an application for biometrics. Based on the above, we uphold the Immigration Judge's decision finding that the respondent is deemed to have abandoned her application for relief by failing to submit updated biometrics.⁴

As to the denial of continuance, the regulation provides that an Immigration Judge may grant a motion for continuance for "good cause shown." 8 C.F.R. § 1003.29. A decision to grant or deny a request for continuance is within the Immigration Judge's sound discretion, and will not be overturned on appeal unless it is shown that the respondent was denied a full and fair hearing. *Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1997). In addition, the respondent must

⁴ The respondent suggests that the time gap between the January 4, 2012, hearing and May 6, 2015, hearing may have been a factor in her failure to have the biometrics updated, as her case was continued from an initial individual hearing date of April 3, 2014, to the actual date of May 6, 2015. However, the last time the respondent's biometrics were taken was January 2012, already more than 15 months before the April 3, 2014. Furthermore, the notice of the May 6, 2015, hearing was issued on November 10, 2013, providing sufficient time for the respondent to comply with the biometrics requirement.

show actual prejudice or harm from the denial of continuance. *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983). Therefore, we will review de novo the Immigration Judge's denial of the respondent's request for continuance under these standards.

The respondent argues that her misunderstanding about the renewal process for biometrics and the personal and marital problems she experienced constitute good cause for a further continuance (Resp. App. Brief, at 9). As we uphold the Immigration Judge's decision finding that the respondent is deemed to have abandoned her application for relief despite these arguments, they do not constitute "good cause" for continuance of the respondent's case. In addition, as noted by the Immigration Judge, the respondent did not file a motion to continue at least 2 weeks before her scheduled hearing date as required in the Immigration Court Practice Manual (I.J. at 7).⁵ Based on the above, we uphold the Immigration Judge's denial of further continuance, and we will dismiss the respondent's appeal.

The Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a voluntary departure bond in the amount of \$500 to the DHS within five business days from the date of the order (I.J. at 7-8). The record reflects that the respondent submitted timely proof of having paid the voluntary departure bond. Accordingly, the period of voluntary departure will be reinstated. Based on the above, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. See section 240B(b) of the Act, 8 U.S.C. § 1229c(b); see also 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

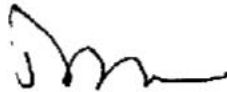
NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is

⁵ The respondent's counsel states that he only learned about the respondent's failure to submit updated fingerprinting on the day of the hearing (Resp. App. Brief, at 1). Counsel stated that "it's something I should have probably followed up on as well" (Tr. at 39). However, the respondent has not argued that ineffective assistance of counsel was a reason for her failure to keep the biometrics updated. Therefore, we will not consider this issue.

automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. See 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. See 8 C.F.R. § 1240.26(i).



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Portland, OR

Date: JUN 17 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: N. David Shamloo, Esquire

APPLICATIONS: (b) (6)

The respondent, a native and citizen of Guatemala, appeals the Immigration Judge's February 24, 2015, decision denying his applications for (b) (6)

(b) (6)

(b) (6)

¹ We have not received a response from the Department of Homeland Security ("DHS"). We will dismiss the appeal.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. 1003.1(d)(3)(ii). The Immigration Judge found the respondent was credible.

We affirm the Immigration Judge's determination that the respondent was not eligible for

(b) (6) because he did not (b) (6) and he did not establish (b) (6)

(b) (6) that materially affect the applicant's eligibility for (b) (6) that would (b) (6)

(b) (6) his application (I.J. at 4-5). See sections (b) (6)

(b) (6) The respondent claims he (b) (6)

(b) (6) in Guatemala in 2000 (Resp. Br. at 7-15; Tr. at 31-32). It is undisputed that

the respondent did not apply for (b) (6) of his re-entry to the United States in

2002. On appeal, the respondent argues that because conditions in Guatemala have (b) (6)

since 2000, the Immigration Judge erred in finding that he failed to demonstrate (b) (6)

(b) (6) (Resp. Br. at 6-7). See (b) (6)

(including (b) (6)

(b) (6). The respondent argues that his (b) (6) Guatemala has been

enhanced stemming from (b) (6) and claims this constitutes (b) (6)

(b) (6) within the meaning of section (b) (6) of the Act (Resp. Br. at 7). The

¹ We note that the Immigration Judge did grant the respondent the minimal relief of voluntary departure, and the DHS did not appeal from this. The respondent has filed proof that he posted the requisite voluntary departure bond; therefore, we will reinstate the grant of voluntary departure.

(b) (6)

Immigration Judge correctly found that the respondent did not establish that (b) (6) Guatemala and (b) (6) because those events did not "materially affect his eligibility for (b) (6) which stems from his claimed (b) (6) in 2000 (I.J. at 5). Section (b) (6) of the Act. When asked if the things (b) (6) since his departure (b) (6) in any way, the respondent stated, "No. (b) (6) is still the same." (Tr. at 50). We agree with the Immigration Judge's determination that the respondent's (b) (6) in Guatemala does not meet the criteria of the (b) (6) because such a claim is not cognizable as a basis for (b) (6) under the Act (I.J. at 5). See (b) (6) (9th Cir. 2010) (b) (6) to a (b) (6) (9th Cir. 2008) (b) (6) for (b) (6). Therefore, the respondent is statutorily (b) (6) because the respondent did not establish by clear and convincing evidence the existence of (b) (6) to qualify for (b) (6) pursuant to (b) (6) Section (b) (6) (BIA 2005).

We uphold the Immigration Judge's alternative determination that the respondent's (b) (6) in the Act (I.J. at 5-7). The respondent testified that 3 months after he returned to Guatemala from his first trip to the United States, he encountered (b) (6) (Tr. at 33). (b) (6) and were described (b) (6) (b) (6) them" (the respondent thought (b) (6) that the respondent had not taken them to the United States when the respondent first left Guatemala in 1997, at the age of (b) (6) (I.J. at 3; Tr. at 32, 50). The (b) (6) (I.J. at 3; Tr. at 32). The respondent (b) (6) saying it happened (b) (6) (Tr. at 32). Three months later, the respondent (b) (6) the respondent (b) (6) fortunately, he was (b) (6) (Tr. at 34, 35-36). The respondent (b) (6) because the respondent did not have (b) (6) (Tr. at 36). The respondent (b) (6) after that and returned to the United States in 2002 (Tr. at 27).

The respondent challenges the Immigration Judge's determination that he did not establish that he (b) (6). We uphold the Immigration Judge's determination that the respondent did not establish that he is (b) (6) within the meaning of the Act.² The Immigration Judge found that the respondent did not establish that (b) (6) or that there was any evidence to suggest that the respondent's (b) (6) in light of the

² The respondent specifically withdrew the (b) (6) originally noted on the (b) (6) application (Tr. at 52; Exh. 4).

(b) (6)

respondent's testimony that (b) (6) and (b) (6) (I.J. at 3; Tr. at 37). The Immigration Judge found that the respondent did not establish that he was (b) (6) of the (b) (6) based upon the respondent's testimony that (b) (6) (b) (6) (Tr. at 38).³ The Immigration Judge determined from the respondent's testimony that others were also (b) (6) because that was (b) (6). The Immigration Judge found that the respondent did not establish that (b) (6) meets the requirement of (b) (6) or that there was any evidence to suggest that the respondent's (b) (6) (I.J. at 3; Tr. at 37). In addition to (b) (6) the (b) (6) the respondent claims also that (b) (6) by a (b) (6) (Tr. at 30). (b) (6) out (b) (6) does not establish eligibility for (b) (6) and (b) (6) (finding that "aliens (b) (6) will not be granted (b) (6) on that basis); see also (9th Cir. 2010). The Immigration Judge correctly found that the respondent did not establish (b) (6) was (b) (6). We uphold this finding as we find no clear error. *Matter of D-R-*, 25 I&N Dec. 445, 453 (BIA 2011) (motive is a finding of fact which the Board reviews for clear error).

The respondent (b) (6) Guatemala because he (b) (6) (b) (6) The Immigration Judge correctly found that the respondent and his family (b) (6) or (b) (6) generally are not entitled to (b) (6) (BIA 2010) (b) (6) are not entitled to (b) (6) (9th Cir. 2010) ("(b) (6) is not available to (b) (6) of a (b) (6) "). The respondent testified that (b) (6) (b) (6) (Tr. at 37). In 2012, the respondent's mother (b) (6) and she (b) (6) (Tr. at 37). The respondent did not establish that the (b) (6) in Guatemala to (b) (6). We do not see a basis to disturb the conclusions of the Immigration Judge. We uphold this finding as the respondent has not shown it to be clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). Inasmuch as the respondent did not meet his burden of proof for (b) (6) it follows that he cannot (b) (6) (b) (6) (9th Cir. 2006).

³ The respondent testified that (b) (6) has been in jail for 7 years and has been sentenced to life (Tr. at 38).

(b) (6)

Finally, we affirm the Immigration Judge's denial of the respondent's application for (b) (6) (I.J. at 8). The respondent has not demonstrated that (b) (6)

(b) (6)

(b) (6)

(b) (6)

in Guatemala (I.J. at 8). See

(b) (6) (BIA 2002) (rejecting claim based on a chain of assumptions and (b) (6) what might happen, rather than evidence that meets [the] burden of demonstrating that (b) (6) (emphasis in original)); see also (b) (6) (9th Cir. 2008). The respondent did not testify that he had (b) (6) and did not state a basis for (b) (6) in this regard.

The respondent did not meet his burden of proof to establish that (b) (6) (b) (6). The respondent has not introduced evidence establishing that (b) (6) that the (b) (6). The Immigration Judge considered the background evidence submitted by the respondent and found that those materials did not establish that (b) (6) as that term is defined in (b) (6) when he returns to Guatemala, even considering all (b) (6) (I.J. at 8). (b) (6) (9th Cir. 2003) (b) (6) (9th Cir. 2001). The respondent has failed to establish eligibility under (b) (6)

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. See section 240B(b) of the Act, 8 U.S.C. § 1229c(b); see also 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or

extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Seattle, WA

Date: MAY 27 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Manuel Rios, Esquire

ON BEHALF OF DHS: Ryan A. Kahler
Assistant Chief Counsel

APPLICATION: Reopening; stay of removal

This matter was last before the Board on April 30, 2015, when we upheld an Immigration Judge's decision denying the respondent's motion to continue proceedings.¹ On July 29, 2015, the respondent filed his first timely motion to reopen, which includes a request for a stay of removal. The Department of Homeland Security ("DHS") has filed an opposition to the motion. The motion will be denied.

A motion to reopen must be accompanied by material and previously unavailable evidence that establishes prima facie eligibility for relief. *See* section 240(c)(7)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). The evidence the respondent submitted with the instant motion does not indicate that reopening to pursue relief from removal is warranted.

It is undisputed that in 2011, the respondent was convicted of solicitation to commit delivery of methamphetamine in violation of Wash. Rev. Code Ann. §§ 9A.28.030, 69.50.401(1), (2)(b) (2008) (Respondent's Motion to Reopen, Tab F at 148). It is also undisputed that the respondent was originally sentenced to 10 months of imprisonment and that he actually served more than one hundred and eighty days in prison (Exh. 3; Respondent's Brief at 3).

The instant motion is accompanied by evidence that on (b) (6) 2015, a judge in the Superior Court of Washington for (b) (6) resented the respondent to 179 days of confinement nunc pro tunc, with credit given for time served (Respondent's Motion to Reopen, Tab F at 151). The respondent asserts that due to this modification, which was issued after the Immigration Judge entered a final order of removal in 2013, he is now statutorily eligible for cancellation of removal under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1), as he is no longer barred for failure to show the requisite good moral character (Respondent's Motion to Reopen at 4-7). *See* section 101(f)(7) of the Act, 8 U.S.C. § 1101(f)(7) (excluding from the definition of good moral character "one who during such period has been confined, as a result of

¹ There was no indication that the respondent was eligible for any form of relief when he appeared before the Immigration Judge and he declined to pursue voluntary departure (Tr. at 3).

conviction, to a penal institution for an aggregate period of one hundred and eighty days or more . . .”).

However, the plain language of section 101(f)(7) of the Act indicates that Congress intended to apply the actual period of confinement served by an alien pursuant to a lawful sentence in determining whether an alien meets the aggregate period of 180 days. See *Garcia-Mendoza v. Holder*, 753 F.3d 1165, 1169 (10th Cir. 2014) (deferring to the Board’s conclusion that the alien’s actual confinement for more than 180 days precluded him from cancellation of removal, despite a subsequent court order resentencing him to 166 days, as section 101(f)(7) of the Act focuses on the actual period of confinement and does not reference the ordered term of imprisonment) (persuasive authority); see generally *Matter of Gantus-Bobadilla*, 13 I&N Dec. 777, 780 (BIA 1971) (“Section 101(f)(7) of the Act, as a matter of law, bars a finding of good moral character where there has been actual confinement for a period of one hundred and eighty days.”), *rev’d on other grounds*, *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994); *Matter of Piroglu*, 17 I&N Dec. 578, 580 (BIA 1980) (noting that the rationale behind section 101(f)(7) of the Act was that a person who has served a jail term of a specified length is not entitled to special exemptions from the penalties of the immigration laws). Section 101(a)(48)(B) of the Act serves as a point of comparison. Unlike section 101(f)(7) of the Act, the language of section 101(a)(48)(B) of the Act emphasizes the term of imprisonment to which an alien was *ordered* to serve by the court, regardless of any suspensions of the imposition or how the sentence was actually carried out. See *Alberto-Gonzalez v. INS*, 215 F.3d 906, 909 (9th Cir. 2000); *Matter of S-S-*, 21 I&N Dec. 900, 902 (BIA 1997).

In the instant matter, the respondent actually spent more than 180 days in prison pursuant to a then-existing lawful sentence as a result of his conviction. As such, the respondent is unable to demonstrate the requisite good moral character. See section 101(f)(7) of the Act; *Garcia-Mendoza v. Holder*, *supra*; *Matter of Gantus-Bobadilla*, *supra*. The respondent argues that we should only count the 179 days of imprisonment that he was resentenced to nunc pro tunc, as said sentence reduction is entitled to full faith and credit by the Board under *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) and *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) (Respondent’s Motion to Reopen at 8). While the respondent is correct in his assertion that the sentence reduction is entitled to full faith and credit, *Matter of Cota-Vargas*, *supra*, and *Matter of Song*, *supra*, do not address the period of confinement pursuant to a lawful sentence under section 101(f)(7) of the Act, which is a central issue in the respondent’s case; rather, they concern the issue of the length of the sentence ultimately ordered, as opposed to the sentence actually imposed, and thus, those cases are distinguishable from the respondent’s case. See *Matter of Cota-Vargas*, *supra*, at 852; *Matter of Song*, *supra*, at 174. We thus conclude that the nunc pro tunc sentencing relief has no effect on the good moral character provision for calculating the 180-day period. See *Garcia-Mendoza v. Holder*, *supra*.²

² We note that the respondent’s actual conviction was not vacated and the respondent did not present evidence that the original sentence imposed was in violation of the Constitution of the United States or the State of Washington.

Based on the foregoing, we conclude that the respondent has not established prima facie eligibility for relief and as such, we find no basis for reopening. In view of our disposition of the respondent's motion, we need not address the additional issues raised by the parties. *See Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015). Further, we do not find an exceptional circumstance in this case that would warrant the exercise of our limited sua sponte authority. *See* 8 C.F.R. § 1003.2(a).

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of removal is denied as moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: MAR 29 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Zulu Ali, Esquire

APPLICATION: Reopening

The Board entered the final administrative decision on March 5, 2014, when we dismissed the respondent's appeal of the Immigration Judge's decision denying a previous motion to reopen.¹ The respondent has now filed another motion nearly 2 years later. The Department of Homeland Security has not responded to the motion, which will be denied as untimely and number-barred, as the respondent has not demonstrated that an exception to the time and number limitations on motions to reopen applies. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2).

In particular, the respondent has not met his burden of establishing (b) (6) in Saudi Arabia, such that his motion falls within an exception to the time limitations imposed by 8 C.F.R. § 1003.2(c)(3). The respondent's allegations are not based on personal knowledge, where he has not lived in Saudi Arabia in over a decade (I.J. at 1). Further, the evidence submitted with the motion reflects substantially similar background conditions in Saudi Arabia to those that existed at the time of the respondent's hearing. 8 C.F.R. § 1003.2(c)(3); *compare* Respondent's Motion, tabs D-E with Exh. 2, tabs I-J, N. The (b) (6)'s letter discussing the respondent's son's (b) (6) is identical with the exception of the date – to a letter submitted to the Immigration Judge. *Compare* Respondent's Motion, tab B with Exh. 2, tab M. Therefore, reopening is not warranted. See *INS v. Abudu*, 485 U.S. 94, 104-05 (1988); *Toufighi v. Mukasey*, 538 F.3d 988, 996 (9th Cir. 2008) (alien must establish a (b) (6), as well as a prima facie case for the underlying substantive relief sought in order to prevail on a motion to reopen); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (alien must satisfy heavy burden of establishing that if the proceedings were reopened the new evidence would likely change the result in the case).

Nor has the respondent shown that the allegations in his affidavit and (b) (6) application could not have reasonably been presented at his February 2012 hearing.² 8 C.F.R. § 1003.2(c)(1).

¹ The respondent's children (b) (6) were previously involved in the proceedings, but are not parties to the motion.

² Notwithstanding the respondent's counsel's allegations, the respondent has not adequately demonstrated that evidence concerning the purported International Police warrant
(continued...)

(b) (6)

Additionally, the respondent has not prima facie shown that he will (b) (6). While we are sympathetic to the respondent's son's (b) (6), the respondent has not demonstrated that (b) (6) for (b) (6) purposes. See, (b) (6) (9th Cir. 2013) (recognizing that individuals with (b) (6) are insufficiently (b) (6)); (b) (6) (BIA 2014) ("To be (b) (6) (b) (6)"). Nor has he prima facially demonstrated that he will (b) (6) in Saudi Arabia.

Finally, the respondent has not demonstrated an exceptional circumstance warranting sua sponte reopening. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Accordingly, the motion will be denied.

ORDER: The motion is denied.

FURTHER ORDER: he request for a stay is denied as moot.



FOR THE BOARD

(...continued)

was not reasonably available at his hearing. See generally *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (statements of counsel are not considered evidence).

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 10 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Reyna M. Tanner, Esquire

APPLICATION: (b) (6)

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's decision dated December 4, 2014, denying his applications for (b) (6) of the Immigration and Nationality Act, (b) (6). The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

In her decision, the Immigration Judge denied the respondent's (b) (6) application upon concluding that it was time-barred; however, her basis for this conclusion relies on an incorrect statement that the respondent did not know he had to file the application (I.J. at 1; *unmarked exhibit* "(b) (6)"). In doing so, the Immigration Judge also misidentified the respondent's last entry into the United States (*Id.*). Thus, we will remand for the Immigration Judge to reassess this issue and enter the correct findings of fact and analysis to support her determination.

The Immigration Judge denied the respondent's (b) (6) claim; however, her recitation of the respondent's testimony in support of his claim is not sufficient because the respondent was denied the opportunity to give more factual details about his application through oral testimony. The Immigration Judge also refused to accept updated Department of State Country Reports. Considering the totality of the circumstances presented, including the erroneous statements underlying the pretermission of the respondent's (b) (6) claim, remand is warranted for further consideration of the respondent's (b) (6). See generally (b) (6) (BIA 2014) (noting that a full evidentiary hearing is ordinarily required prior to the entry of a decision on the merits of an application for (b) (6)). Upon remand, the Immigration Judge should provide the respondent with an opportunity to present additional evidence and testimony. After providing the respondent with an opportunity to further present his claims and allowing the Department of Homeland Security to respond to those claims, the Immigration Judge should issue a new decision which considers the totality of the testimony presented and the evidence contained in the record.

Likewise, we conclude that remand for additional consideration of the respondent's (b) (6) claim is appropriate. The Immigration Judge's analysis of the respondent's application is insufficient (I.J. at 3). The Immigration Judge's analysis does not reflect adequate consideration of the evidence of record or provide sufficient legal analysis. *See Aguilar-Ramos v. Holder*, 594 F.3d 701, 705-06 (9th Cir. 2010) (requiring explicit consideration and discussion of pertinent background evidence). The Immigration Judge should explicitly consider the background evidence in the record and determine: (1) what is likely to happen to the respondent upon his removal to Mexico; (2) whether what is likely to happen to the respondent (b) (6); and (3) whether what is likely to happen to the respondent (b) (6)

_____. (b) (6) _____


_____ ■ _____

The Immigration Judge denied voluntary departure as a matter of discretion based on the erroneous statement that the respondent has been convicted of driving under the influence of alcohol (I.J. at 3). On remand, the Immigration Judge should reassess the respondent's request for voluntary departure.

The parties shall be permitted to supplement the record with additional evidence. We acknowledge the respondent's request to remand this matter to a different Immigration Judge. However, notwithstanding the factual and procedural errors outlined above, there is a lack of evidence of bias. We will not remand this case to a different Immigration Judge. Our decision to remand this case should not be construed as indicating any position with regard to the ultimate resolution of the respondent's case.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Dallas, TX

Date: FEB 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Cam (Carrie) X. Nguyen, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of a material fact (sustained)

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document (sustained)

APPLICATION: Remand; (b) (6)

The respondent is a native and citizen of Mexico who appeals from a July 16, 2014, Immigration Judge decision finding him removable as charged. The Immigration Judge denied the respondent's application for (b) (6) under section (b) (6) of the Immigration and Nationality Act, (b) (6), and (b) (6) under section (b) (6) of the Act, (b) (6), and his request for (b) (6), for failure to meet his burden of proof. The Immigration Judge also determined that the respondent's (b) (6) application was (b) (6). We will sustain the respondent's appeal in part and dismiss it in part, and deny his motion to remand.

We review findings of fact, including credibility findings, under the "clearly erroneous" standard and we review all other issues de novo, including questions of law, discretion, and judgment. See 8 C.F.R. §§ 1003.1(d)(3)(i), (ii); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

The respondent entered the United States on or about April 6, 2013, without a valid entry document and by falsely representing himself as a lawful permanent resident alien under a different name. He was given a (b) (6) and placed into proceedings on April 18, 2013. In November 2013, he filed (b) (6) application with the Immigration Judge, alleging (b) (6).

On appeal, the respondent contends that the Immigration Judge erred in denying his motion to continue. The respondent asserts that the Immigration Judge erred by excluding a video from evidence and by not allowing telephonic testimony of witnesses in the United States, England, and Mexico. In addition, the respondent contends that the Immigration Judge erred in concluding that his (b) (6). The respondent asks that the Immigration

(b) (6)

Judge's decision be reversed or the record remanded due to the respondent's prior counsel's ineffective assistance. The respondent does not contest the denial of his request for (b) (6) and we deem that issue abandoned. *Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999).

The respondent argues that he (b) (6) in Mexico (b) (6) in the community (I.J. at 9). Respondent's brief at 4. The respondent testified that he returned to his home town after accepting voluntary departure in February of 2013 (I.J. at 4; Tr. at 38). Upon his return, he heard third hand from his cousin that someone (b) (6) (I.J. at 8; Tr. at 47). The respondent presumed this meant him, and (b) (6) returned to the United States in (b) (6) of 2013 (I.J. at 8; Tr. at 48; Exh. 2). The Immigration Judge found it speculative that (b) (6), which was (b) (6), was directed to the respondent. Additionally, the Immigration Judge noted that the respondent had not (b) (6) (I.J. at 8; Tr. at 56). The Immigration Judge concluded the respondent had not met his burden to demonstrate that he (b) (6) in Mexico. We conclude that even if the (b) (6) to the respondent, it does not (b) (6) cannot be based on (b) (6) (b) (6) (5th Cir. 2006) (internal citation and quotations omitted). (b) (6) cannot be based on (b) (6). See (b) (6) (5th Cir. 2004).

The Immigration Judge found that the respondent did not demonstrate (b) (6) is not viable (I.J. at 9). In particular, being a (b) (6) is not (b) (6) because the respondent states that he would (b) (6) if he returns to one particular region in Mexico (I.J. at 9). (b) (6) (BIA 2014). Moreover, the Immigration Judge found that even if this were a (b) (6), there is no (b) (6) and the (b) (6). The record indicates that the respondent (b) (6) (I.J. at 9; Tr. at 8), but the (b) (6) is not a basis for (b) (6) claim. See (b) (6). Considering the evidence of record, the Immigration Judge's conclusion that the respondent failed to establish a (b) (6) is not clearly erroneous. Inasmuch as the respondent has failed to satisfy (b) (6) required for (b) (6), it follows that he also has failed to satisfy the (b) (6) on this basis. (b) (6) (BIA 1997).

Although we agree with the Immigration Judge's conclusion that the respondent did not meet his burden of proof for (b) (6), we do not support the conclusion that his application was (b) (6). In determining whether a respondent has submitted a (b) (6) application, we look to the four factors outlined in (b) (6) (BIA 2007). An (b) (6) application may be deemed (b) (6) where: (1) notice is given to the alien of the consequences of filing (b) (6); (2) there is a specific finding by the Immigration Judge or the Board that the alien (b) (6); (3) there is sufficient

evidence in the record to support the finding that a material element of (b) (6) was (b) (6); and (4) there is an indication in the record that the alien has been afforded sufficient opportunity to (b) (6) of the claim. *Id.*

The record indicates that the respondent was given notice of the consequences of (b) (6) a (b) (6). The Immigration Judge made a specific finding of (b) (6) based on (b) (6) he made about his children and a finding that the respondent accepted a prior grant of voluntary departure in bad faith (I.J. at 11-12; Tr. at 8, 29). Upon de novo review, we conclude that there is insufficient evidence in the record to support the conclusion that a material element of the (b) (6) application was (b) (6). The record reveals that the respondent was asked about the children listed on his (b) (6) application. The respondent seemed confused that the two children of his friend were listed on his (b) (6) application along with his two stepchildren (Tr. at 59, 63). The respondent clarified that he has two stepchildren and one biological child (Tr. at 59-60, 63).

While the respondent did not really provide an explanation for the other children on his application, the record does not indicate that the respondent (b) (6) of his (b) (6) application. Nor is it apparent to us how this error is material to his (b) (6) application. The Immigration Judge also speculated that the respondent accepted a prior grant of voluntary departure in bad faith. This conjecture does not go to whether the respondent's application is (b) (6). We conclude that the evidence is not sufficient to support a finding that the respondent (b) (6) application. Based on the foregoing discussion, we determine that (b) (6), has not been satisfied, and we will reverse the Immigration Judge's (b) (6) determination.

The respondent argues on appeal that the Immigration Judge erred in not granting him a continuance. Respondent's brief at 8. The respondent's former counsel moved the Immigration Judge to continue proceedings for, among other reasons, because the respondent's counsel sustained a head injury in a motorcycle accident about 5 months before the merits hearing; and the air conditioning system had not been functioning in his office for about 3 months before the merits hearing, making working conditions very difficult. A party seeking a continuance has the burden to establish good cause for a continuance. *See Matter of Sibrun*, 18 I&N Dec. 354, 355-56 (BIA 1983); 8 C.F.R. § 1003.29. This was the respondent's second motion to continue, and the Immigration Judge had granted his previous requests (Tr. at 30). The Immigration Judge denied the request, finding the third request was not a reasonable basis for a continuance (Tr. at 35). We agree with the Immigration Judge's determination to deny any further continuance, under the circumstances of this case. The decision to grant or deny a continuance is within the discretion of the Immigration Judge, and good cause must be shown. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); 8 C.F.R. § 1003.29.

The respondent also argues on appeal that the Immigration Judge erred in not continuing the hearing to allow the testimony of his wife and telephonic testimony of witnesses in Mexico and an expert witness in the United Kingdom, and by not accepting a video into evidence without a transcript of the video. Respondent's brief at 5, 8-9. We agree with the Immigration Judge that the respondent did not establish good cause to continue the case for additional testimony from

witnesses, which is cumulative of the testimony provided by the respondent and which is not in dispute (Tr at 68-72). With regard to the video, the respondent has not shown how consideration of the video would alter the result in this case (Tr. at 26-27).

The respondent asks that, if we do not reverse the Immigration Judge's decision, we remand the record in order for the Immigration Judge to reopen proceedings based on ineffective assistance of counsel. In support of that assertion, the respondent attaches a motion to reopen to be filed with the Immigration Judge. We will construe the respondent's attached motion to reopen as one to remand. The standard for both is the same. The Board long has held that a motion to remand must meet the same standards as a motion to reopen. *Matter of Coelho*, 20 I&N Dec. 464, 471 72 (BIA 1992). Specifically, the Board may deny a motion to remand where a respondent has not established *prima facie* eligibility for the relief sought or where the evidence to be submitted in support of the motion was not previously unavailable or material to the relief requested. *Id.* at 472. Further, the party moving to remand bears a "heavy burden" of proving that the new evidence would likely change the result in the case if it were remanded. *Id.* Finally, the Board may deny such a motion where the ultimate relief sought is discretionary and we would not grant the relief as a matter of discretion. *Id.*

An ineffective assistance of counsel claim must be supported by (1) an affidavit from the respondent setting forth in detail the agreement that was entered into with counsel regarding the litigation matters the attorney was retained to address, (2) documentary evidence that the counsel in question was informed of the allegations leveled against him and given an opportunity to respond, and (3) proof that a complaint has been filed with appropriate disciplinary authorities with respect to the alleged ineffective assistance (and if this is not filed, why it was not). *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

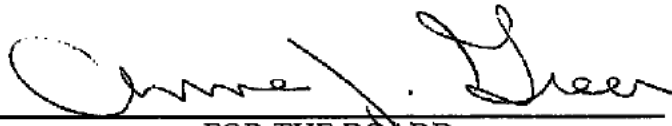
The respondent has complied with the procedural requirements set forth in *Matter of Lozada*, *supra*, for making an ineffective assistance of counsel claim. However, his claim still fails because he did not show prejudice in this instance. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). In the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, an alien must demonstrate that he suffered "substantial prejudice" as a result of counsel's ineffectiveness. See *Ogbemudia v. INS*, 988 F.2d 595, 598 (5th Cir. 1993). In order to demonstrate "substantial prejudice," a respondent must demonstrate that he is *prima facie* eligible for the relief sought and could have made a strong showing in support of his application. *Anwar v. INS*, 116 F.3d 140, 144 (5th Cir. 1997); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994); *Ali v. Holder*, 484 Fed.Appx. 993, 994 (5th Cir. 2012). Here, we do not find that the respondent met his burden to show substantial prejudice because he has not demonstrated that he is *prima facie* eligible for (b) (6) or any other form of relief based on the general nature of the threat he references. (b) (6)

Accordingly, the following order will be issued:

ORDER: The motion to remand is denied.

FURTHER ORDER: The Immigration Judge's finding that respondent (b) (6) application is reversed.

FURTHER ORDER: The appeal is otherwise dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Boston, MA

Date:

APR 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Saher J. Macarius, Esquire

APPLICATION: Reopening

The final administrative decision in this case was issued by the Immigration Judge on February 7, 2013, finding the respondent removable as charged, and denying her application for adjustment of status as a matter of discretion.¹ On October 13, 2015, she filed a motion to reopen with this Board seeking an opportunity to apply for (b) (6) to Kenya, and (b) (6). The Department of Homeland Security (DHS) has not filed a response. The motion will be denied.

The respondent's motion to reopen is untimely and number barred. Sections 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) and (C)(i); 8 C.F.R. § 1003.2(c)(2). She contends that her motion is exempt from the motion to reopen filing requirements pursuant to the (b) (6). (b) (6) Sua sponte reopening is also sought based on legal developments concerning (b) (6) claims.

The respondent is a (b) (6)-year-old married female, and a citizen of Kenya. She claims that in 1997, when she was a (b) (6)-year-old teenager, she (b) (6) to (b) (6), and that thereby she (b) (6). She asserts that (b) (6) and in Kenya generally, and that her mother, cousin, aunts, and others have (b) (6). She contends that she (b) (6) because she (b) (6) she (b) (6). The respondent may also (b) (6).² Motion, Tab C (respondent's declaration).

¹ The respondent did not appeal this decision by the Immigration Judge. She subsequently filed a motion to reopen with the Immigration Judge based on claims of ineffective of assistance by former counsel. This motion was denied March 27, 2013, and on September 11, 2014, we affirmed, without opinion, the results of the Immigration Judge's decision.

² The respondent did not apply for (b) (6) at any point in her removal proceedings based on any of these claims.

(b) (6)

In addition, the respondent asserts that (b) (6) in Kenya, and that she will be (b) (6). She points out that (b) (6) in 2007 during a period of (b) (6). Finally, she asserts that as (b) (6), she (b) (6) in Kenya, and possibly will (b) (6). *Ibid.*

The respondent's last hearing was conducted February 7, 2013, and therefore to reopen her proceedings pursuant to 8 C.F.R. § 1003.2(c)(3)(ii) (given the untimely and number barred nature of her motion), she must demonstrate (b) (6) in Kenya since that time that affect her eligibility for (b) (6) based on her current claims. To make this required showing, she has submitted copies of the 2014 (b) (6) published by the United States Department of State (2014 DOS Report); and, articles discussing (1) (b) (6) in Kenya in 2007-08, and the withdrawal (in (b) (6) 2014) of attendant (b) (6) the current President of Kenya; (2) a (b) (6) 2015 (b) (6), (3) the (b) (6) and (3) the enactment of a (b) (6) in Kenya. Motion, Exhs. X-EE.

However, the respondent has not identified anything in the aforementioned material that discusses (b) (6) in Kenya in (b) (6) 2013, as pertinent to her (b) (6). Therefore, she has not established, as she must, that the (b) (6) reported in this material are indicative of (b) (6) since her last hearing regarding her current claims. It is incumbent on her to provide such evidence to provide a backdrop against which her assertions of "(b) (6)" arising in Kenya can be analyzed.

As an additional matter, although the respondent (b) (6) the submitted material (including the 2014 DOS Report) makes no mention of (b) (6) at all. To the extent she (b) (6), she has not shown that the (b) (6) in Kenya (notwithstanding that this (b) (6) in 2011), as reported in the 2014 DOS Report, constitute (b) (6) since her last hearing in 2013.³ She also has not submitted any evidence establishing that anyone in Kenya, (b) (6) has specifically (b) (6) her return.

Concerning the respondent's (b) (6), there has been no showing that (b) (6), and has (b) (6), or for (b) (6). To the extent she (b) (6) on this

³ The respondent's motion does not address the State Department's (b) (6) on Kenya for 2013 (at 5) (reporting substantially (b) (6) in Kenya, using similar, if not identical, terminology, regarding (b) (6) in Kenya since 2011).

(b) (6)

(b) (6) we note that general (b) (6) as a whole are insufficient to support a claim of (b) (6). Similarly, such (b) (6) are insufficient to show that (b) (6) (b) (6) (b) (6), if she returned to Kenya. See (b) (6).

The respondent also has not shown prima facie eligibility for (b) (6) based on the submitted articles reporting on the recent dropping of charges against the President of Kenya, (b) (6) in her homeland.

Based on the foregoing, the respondent has not demonstrated that her untimely and number barred motion to reopen is excused from the general motion to reopen filing requirements pursuant to the (b) (6). Sections (b) (6) of the Act, (b) (6).

The respondent also urges sua sponte reopening based on her (b) (6) claims in light of (b) (6) in the law," including (b) (6) (BIA 2009) (involving an alien who was (b) (6)). Motion at 4-6. However, (b) (6) was published before the respondent's 2013 hearing, and thus is not a new legal development. Moreover, she has not demonstrated the applicability of (b) (6) to her (b) (6). She does not claim that she (b) (6) and she has not shown that she was (b) (6) in Kenya (b) (6). We also decline to reopen her proceedings on our own motion based on the other considerations presented. (b) (6) (BIA 1997); (b) (6) (BIA 1999).

To the extent the respondent seeks a favorable exercise of prosecutorial discretion regarding her case based on (b) (6) or other considerations, she must direct her request to the DHS. Accordingly, the respondent's untimely and number barred motion to reopen will be denied. Her request for a stay of removal pending adjudication of her motion to reopen is denied as moot.

ORDER: The motion to reopen is denied.


FOR THE BOARD

⁴ The respondent cites two other cases in support of these contentions, but she not explained how these cases support her request for sua sponte reopening for consideration of her eligibility for relief based on (b) (6) claims. Motion at 6 (citing (b) (6) (2008) (regarding the right to pursue a motion to reopen in cases where an alien has been granted voluntary departure) and (b) (6) (for which a full and proper citation has not been provided).

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date: JUN 07 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sarah Doll, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] -
Nonimmigrant - violated conditions of status

APPLICATION: (b) (6)

The respondent, a native and citizen of China, appeals from the Immigration Judge's July 6, 2015, decision denying his applications for (b) (6) pursuant to sections (b) (6) of the Immigration and Nationality Act, (b) (6), and his request for (b) (6) pursuant to (b) (6). The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). See also *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

The respondent's (b) (6) application was filed on October 21, 2010, and relates to his (b) (6) 2010, (b) (6) (I.J. at 2-3; Exh. 2). This application is governed by the REAL ID Act of 2005, and the respondent bears the burden of establishing that he is eligible for, and deserving of, all relief sought. 8 C.F.R. § 1240.8(d); section 240(c)(4) of the Act. While expressing some reservations with respect to the respondent's claim, the Immigration Judge found the respondent credible (I.J. at 4-5).

The respondent's claim is that he was (b) (6), 2007, by his English teacher (I.J. at 2; Tr. at 29-30). He began (b) (6), (b) (6) (I.J. at 2; Tr. at 31-32). After his teacher left for the United States, the respondent (b) (6) (I.J. at 3; Tr. at 33-35). On (b) (6) 2010, (b) (6) and the respondent and the other (b) (6) (I.J. at 3; Tr. at 40-41). Immediately following (b) (6) (I.J. at 3; Tr. at 42-43). He was then (b) (6) with (b) (6)

(b) (6)

(b) (6) (I.J. at 3; Tr. at 45-47). He (b) (6) later (I.J. at 3; Tr. at 61). The respondent testified that (b) (6) before securing a student visa and leaving China in (b) (6) 2010 (Tr. at 29, 47).

The Immigration Judge found that the respondent's (b) (6) (I.J. at 5-6, *citing, inter alia*, (b) (6) (9th Cir. 2009), (b) (6) (9th Cir. 2004)). Based on applicable precedent bearing on this issue, including the cases cited by the Immigration Judge and a more recent comparable case considered by the United States Court of Appeals for the Ninth Circuit, we will affirm the Immigration Judge's finding.

In *Gu v. Gonzales, supra*, the applicant was (b) (6) but then (b) (6). *Id.* at 1018. Like the respondent, the applicant did not (b) (6). *Id.* at 1020. The Ninth Circuit found that the (b) (6). *Id.* In (b) (6), the alien was (b) (6). The applicant in (b) (6) was then (b) (6). *Id.* The Ninth Circuit found (b) (6). In (b) (6) (9th Cir. 2013), the Ninth Circuit found (b) (6).

Based on the foregoing and on the factual findings by the Immigration Judge, we affirm the finding that the respondent did not (b) (6) (I.J. at 6). Like the applicant in (b) (6), the respondent had (b) (6), but (b) (6). He did not (b) (6), judging from the lack of evidence reflecting this. We disagree with the respondent's appellate argument that his case is more akin to that of the applicant in (b) (6) (9th Cir. 2005), where (b) (6) was found, because in that case, the applicant (b) (6). (Respondent's Br. at 6). We therefore conclude, based on the entire record and considering (though not treating as determinative) the analysis in the Ninth Circuit's decisions in (b) (6), that the respondent's (b) (6).

As such, the respondent is not entitled to the regulatory presumption that (b) (6) (BIA 2008). The Immigration Judge found that, with the exception of a single second-hand statement from his mother, dated over five years ago, the respondent did not produce any evidence from China bearing on the question of (b) (6) (I.J. at 7; Exh. 4, at

E).¹ We will affirm this finding. Without such evidence, or such evidence as statements from (b) (6) has been, the record lacks evidence to reflect that the respondent (b) (6) in China. Further, while containing some information about (b) (6), the country evidence of record does not contain evidence of (b) (6) so as to support a conclusion that the respondent (b) (6) (I.J. at 7, Exh. 5, 7). The (b) (6), when balanced with the fact that the respondent (b) (6) China for 6 months before entering the United States and when compared with the lack of evidence reflecting that (b) (6) the respondent, all support the Immigration Judge's finding.²

Because the respondent failed to satisfy the lower burden of proof applicable to (b) (6) he necessarily has failed to establish eligibility for (b) (6) burden of proof. (b) (6) (BIA 1987). (b) (6) (9th Cir. 2006).

With respect to the respondent's claim for (b) (6), we find that the respondent has not presented any factual or legal argument for our consideration on appeal. The generalized statement in the introductory paragraph of his brief that (b) (6) was denied by the Immigration Judge does not constitute an argument that the Immigration Judge erred as a matter of fact or law. Therefore, the issue is not before us. See, e.g., *Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by the party on appeal). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.


FOR THE BOARD

¹ The respondent testified that several days before the October 28, 2013, hearing his parents told him that (b) (6) (I.J. at 7; Tr. at 50). However, despite the respondent's claim that this information was sent to him online, he has not produced any corroboration of this claim. *Id.*

² We note that the respondent alleges that the Immigration Judge committed clear error in arriving at two factual findings (Respondent's Br. at 3). We agree that the Immigration Judge incorrectly stated that the respondent (b) (6), when he testified that he (b) (6) (I.J. at 3; Tr. at 47). Further, the respondent testified that he departed China in (b) (6) 2010, not (b) (6) 2010, as stated by the Immigration Judge in her decision (I.J. at 3; Tr. at 25). However, we find these misstatements to be harmless errors as they do not affect the Immigration Judge's ultimate finding that the respondent did not establish (b) (6) in China.

Falls Church, Virginia 22041

Files: (b) (6) – Los Angeles, CA
(b) (6)

Date: JUN 06 2016

In re: (b) (6)
(b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: William Kiang, Esquire

APPLICATION: (b) (6)

The respondents,¹ natives and citizens of the People's Republic of China (China), have appealed an Immigration Judge's January 6, 2015, decision denying their applications for (b) (6) under sections (b) (6) of the Immigration and Nationality Act, (b) (6), and their request for (b) (6).² The Department of Homeland Security has not responded to the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

We adopt and affirm the decision of the Immigration Judge. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The Immigration Judge's adverse credibility finding is not clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). Under the REAL ID Act, an adverse credibility finding must be based on consideration of the totality of the circumstances and all relevant factors, including the responsiveness of the respondent, the inherent plausibility of the respondent's account, the consistency between the respondent's written and oral statements, and the internal consistency of each such statement, without regard to whether an inconsistency goes to the heart of the respondent's claim. Section (b) (6) of the Act; (b) (6) (BIA 2007) (Immigration Judge properly considered totality of circumstances in finding that respondent lacked credibility based on his demeanor, implausible testimony, lack of corroboration, and inconsistent statements).

¹ The respondents are an adult female (b) (6) and her son (b) (6). Each of the respondents has submitted their own application. The son is also a derivative of his mother's (b) (6) application.

² The respondents have not meaningfully challenged the Immigration Judge's decision denying their applications for (b) (6), so we consider any issues in that regard waived. See *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

In support of the adverse credibility determination, the Immigration Judge noted discrepancies within the respondents' testimony and between the respondents' testimony and their witnesses' testimony and the evidence in the record (I.J. at 9-18). Specifically, as noted by the Immigration Judge, there were multiple inconsistencies as to the (b) (6) claims she was (b) (6). (b) (6)'s testimony is unclear as to (b) (6).

(b) (6), (b) (6). Specifically, (b) (6) initially testified that there were (b) (6) every six months; however, she then stated (b) (6) were once a year or every two years. In addition, (b) (6)'s testimony was inconsistent as to whether she (b) (6) for five or fifteen years (Tr. at 34-38, 40, 63-65, 82-83, 109-117, 126-127). (b) (6)'s testimony is also inconsistent as to whether her sister was in China or in the United States at the time of her (b) (6) and whether or not they were in frequent contact during that time (Tr. at 31, 45, 104-107). Furthermore, (b) (6) submitted an (b) (6) which indicates she was (b) (6) years old at the time of the abortion. However, during the hearing she initially testified she was (b) (6) years old when she (b) (6), then after a long pause she stated she was (b) (6) years old, and finally she claimed she was (b) (6) years old (Exh. 4I; Tr. at 67).

The Immigration Judge also pointed out the discrepancies between (b) (6)'s testimony and the testimony of his parents and his pastor (I.J. at 6-8, 15-18). Specifically, she noted that (b) (6) testified that her son stays with her on weekends and then returns to school. Ms. Zhao further stated that her son has not been going to school for the past semester. However, (b) (6) stated that he lives with his mother and has not attended school since mid-2000 (Tr. at 133, 140, 142). In addition, (b) (6) testified that he first started attending church in the United States in (b) (6) of 2009, one month after he entered the United States; however, (b) (6) submitted a document from this church, dated (b) (6) 2010, which indicates he attended church from (b) (6) of 2008 to the present (Exhs. 1A, 3A at 33; Tr. at 178, 236). Furthermore, (b) (6)'s testimony was inconsistent with his father's testimony regarding the church he currently attends. Specifically, the testimony was inconsistent as to whether (b) (6)'s father had ever been to the current church (Tr. at 179, 250). In addition, (b) (6) testified that he currently attends Bible study on Fridays; however, the Pastor stated that Bible study was only on Thursdays (Tr. at 182-183, 298, 304).

The Immigration Judge also found that (b) (6)'s demeanor detracted from her credibility (I.J. at 10). For example, the Immigration Judge found that (b) (6)'s testimony was vague and non-responsive when questioned during the hearing, and that this indicated a lack of candor (I.J. at 10). We give special deference to the Immigration Judge's findings with respect to the respondent's demeanor. *See Oshodi v. Holder*, 729 F.3d 883, 891-92 (9th Cir. 2013) (en banc) (describing importance of Immigration Judge's position to assess demeanor and other cues to credibility of live testimony). The Immigration Judge's specific examples and description of (b) (6)'s demeanor make these findings a proper basis upon which to base an adverse credibility finding. (I.J. at 9-15; *see Bingxu Jin v. Holder*, 748 F.3d 959, 965 (9th Cir. 2014) (upholding adverse credibility finding where Immigration Judge identified specific instances of non-responsiveness)).

We have considered the respondents' arguments regarding the Immigration Judge's adverse credibility finding, and are not persuaded by their challenges. The Immigration Judge is not

required to accept the respondents' explanations, even if plausible, where there are other permissible views of the evidence based on the record. *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011). Considering the totality of the circumstances and all relevant factors, there is no clear error in the Immigration Judge's finding that the respondents were not credible. *Malkandi v. Mukasey*, 544 F.3d 1029, 1039-42 (9th Cir. 2008); *Matter of J-Y-C-*, *supra*. Without credible testimony or persuasive corroboration, the respondents have not established the circumstances of their claim, and thus have not established their eligibility for (b) (6). (b) (6) (9th Cir. 2003). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - Salt Lake City, UT

Date:

SEP 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Irwin J. Berowitz, Esquire

APPLICATION: Reconsideration

This case was last before us on May 7, 2015, when we denied the respondent's untimely motion to reopen his removal proceedings. On June 8, 2015, the respondent submitted the instant motion to reconsider pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security has not responded to the motion. The motion will be denied.

A motion to reconsider shall specify errors of law or fact in the previous order and shall be supported by pertinent authority. See 8 C.F.R. § 1003.2(b)(2). The respondent has not presented a material factual or legal aspect of the case that the Board overlooked based on the arguments raised in his motion to reopen. See *Matter of O-S-G*, 24 I&N Dec. 56 (BIA 2006). Further, he has not otherwise persuaded us to change our decision to deny his motion to reopen.

The respondent, a native and citizen of China, applied for (b) (6). The Immigration Judge found that he was not credible. We dismissed the respondent's appeal from that decision on March 28, 2013. On February 11, 2015, the respondent sought to have his removal proceedings reopened and remanded for further proceedings based on a claim of ineffective assistance of counsel, and to challenge again the Immigration Judge's adverse credibility determination. We denied his motion upon finding that it was untimely, not supported by sufficient evidence for his claim of ineffective assistance of counsel, and not supported by evidence that he exercised due diligence in raising the claim and suffered prejudice resulting from his former counsel's alleged failings. See *Mahamat v. Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988); *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). The respondent now seeks reconsideration of his motion to reopen.

He alleges that to be successful, a *Lozada* motion must contain an affidavit from the alien which details his former counsel's missteps, proof that former counsel has been notified of the allegations, and evidence that a bar complaint has been filed. See Motion, ¶ 1. He states that he provided an affidavit which summarized the inadequate legal actions and inactions of his former counsel, filed a bar complaint, and sent a summary of the complaint to his former counsel, and that he therefore satisfied the *Lozada* requirements. *Id.*, ¶ 2. He now offers mailing records from

his present counsel to both the California State Bar and his former counsel, and a response from the California State Bar requesting additional information. See Exhibit B. However, he does not indicate that he provided the information requested by the California State Bar to process the complaint.

More importantly, even if the respondent has now shown that he complied with the procedural requirements for a claim of ineffective assistance of counsel, he has not demonstrated an error in our determination that he did not present sufficient evidence to support his claim of ineffective assistance of counsel, that he exercised due diligence in raising the claim, or that he suffered prejudice resulting from his former counsel's alleged failings. See *Mahamat v. Gonzales*, *supra*; *Riley v. INS*, *supra*; *Matter of Lozada*, *supra*.

We are not persuaded by the respondent's assertion that we erred in finding that he had not presented sufficient evidence that he exercised due diligence. See Motion, ¶ 3. He states that we found that his statement that he consulted with other attorneys about how to pursue his case was insufficient, and that according to our decision, it is incumbent on him to provide evidence of the dates and names of his contacts with other attorneys to support his claim of diligence, but that conclusion does not rest on legal precedent and is erroneous. *Id.* He argues that, even if he had provided names and dates, it would not have made any difference because the DHS counsel would not have investigated the matter. *Id.* As stated in both our precedent decisions cited above, and in the decisions of the United States Court of Appeals for the Tenth Circuit, in whose jurisdiction the instant case arises, the movant seeking reopening based on a claim of ineffective assistance of counsel bears the burden to demonstrate that he exercised due diligence in raising his claim. See *Maatougui v. Holder*, 738 F.3d 1230, 1243-46 (10th Cir. 2013); *Galvez Pineda v. Gonzales*, 427 F.3d 833, 838-39 (10th Cir. 2005); *Riley v. INS*, *supra* at 1258. The respondent's vague statement that he consulted with other attorneys, without names and dates, is not sufficient to meet his burden. *Id.* Moreover, he has still not provided such information.

We are not convinced by the respondent's assertion that neither *Riley v. INS*, *supra*, nor *Mahamat v. Gonzales*, *supra*, established a bright line for determining when an alien acts with due diligence, and that the decision of the Second Circuit in *Javorski v. INS*, 232 F.3d 124 (2d Cir. 2000) is instructive. See Motion, ¶¶ 7-8. We properly applied the applicable standards set forth by the Tenth Circuit to the respondent's evidence, and appropriately found that his evidence was not sufficient to meet his burden to demonstrate due diligence. See *Mahamat v. Gonzales*, *supra*; *Riley v. INS*, *supra*. Further, even under Second Circuit precedent decisions, the alien bears the burden of demonstrating that he exercised due diligence during the period he seeks to toll, and a vague claim of consulting with unnamed attorneys on unspecified dates would not be sufficient evidence of due diligence. See *Jian Hua Wang v. BIA*, 508 F.3d 710, 715 (2d Cir. 2007); *Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006).

We find no merit in the respondent's contention that we looked at his situation in a superficial manner, or his claim that our reasoning is prejudicial, conclusory, and demonstrates that we did not read carefully the greater part of his affidavit. See Motion, ¶¶ 4-5. We considered his allegations of ineffective assistance of counsel, and gave appropriate weight to his evidence in finding that the evidence he provided was not sufficient to meet his burden of

demonstrating that equitable tolling of the time limit was warranted to reopen his proceedings based on his claim of ineffective legal assistance.

The respondent declares that we must consider the alleged failures of his prior counsel in their totality, and that it is unacceptable to dismiss summarily all of prior counsel's errors by asserting that some of the alleged errors involve trial strategy. *Id.*, ¶ 14. As the respondent had not shown that he exercised due diligence in raising his claim of ineffective assistance of counsel, and had not provided sufficient evidence to support his claim of ineffective assistance of counsel, we properly denied his untimely motion to reopen. We find no merit in the respondent's incorrect inference that we summarily dismissed the alleged errors of his prior counsel.

We are not persuaded by the respondent's contention that we must review our analysis rendered on March 28, 2013, when we dismissed his appeal, regarding the Immigration Judge's adverse credibility determination, or his contention that if we continue to maintain that the disputed parts of the record constitute material inconsistencies, we must provide a more thorough analysis than previously given. *Id.*, ¶¶ 15-17. We previously found no basis to reopen his proceedings sua sponte to consider again his challenge to the Immigration Judge's adverse credibility determination, and no merit to his claim that we erred in agreeing with the Immigration Judge regarding the plausibility of his explanations for the inconsistencies and omissions. We specifically found that he had not convinced us that reopening is warranted to consider his additional explanations for the inconsistencies, omissions, and discrepancies within his testimony, and between his testimony, prior statements, and documentary evidence. The respondent has not demonstrated an error of fact or law in our denial of his motion to reopen to warrant reconsideration. *See Matter of O-S-G-*, *supra*. Accordingly, his motion will be denied.

ORDER: The respondent's motion for reconsideration is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – New York, NY

Date: MAY 25 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Usman Beshir Ahmad, Esquire

APPLICATION: Reopening

This case was last before us on June 24, 2014, when we dismissed the respondent's appeal from the Immigration Judge's decision denying relief. On March 21, 2016, the respondent filed an untimely motion to reopen. The Department of Homeland Security (DHS) has not responded to the motion, which will be denied.

Section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i), provides that motions to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." We entered the final order of removal in the respondent's case on June 24, 2014. He did not, however, file his current motion until nearly 21 months later. The respondent's motion to reopen therefore is untimely.

The respondent does not claim that his motion fits within any of the statutory or regulatory exceptions to the deadline for filing a motion to reopen, and we do not find that any of these exceptions apply to his case. See section 240(c)(7)(C)(ii) – (iv) of the Act; 8 C.F.R. § 1003.2(c)(3). The respondent instead asserts that he has been the victim of ineffective assistance of counsel by his former attorney. He also asserts that he now is the beneficiary of a pending visa petition filed by his United States citizen spouse and that he is prima facie eligible for adjustment of status.

The United States Court of Appeals for the Second Circuit, the circuit in which the respondent's case arises, has found that the deadline for filing a motion to reopen may be equitably tolled based on a claim of ineffective assistance of counsel if the alien establishes that the attorney's conduct violated his right to due process and that he (the alien) acted diligently in pursuing his case during the period he seeks to have tolled. See *Wang v. BIA*, 508 F.3d 710, 714 (2d Cir. 2007); *Javorski v. U.S. INS*, 232 F.3d 124, 129-33 (2d Cir. 2000). The respondent has not demonstrated that the filing deadline for his motion should be equitably tolled.

Even assuming that the respondent was diligent in discovering the ineffective assistance of his former counsel and that he has satisfied the procedural requirements necessary to obtain reopening on the basis of ineffective assistance of counsel, he has not shown that he was prejudiced by his former attorney's conduct. See *Rashid v. Mukasey*, 533 F.3d 127, 130-31 (2d Cir. 2008) (noting that to prevail on an ineffective assistance of counsel claim, an alien must demonstrate, inter alia, that the alleged ineffective assistance prejudiced the outcome of his case); see also *Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1998). The respondent contends

that the Immigration Judge's adverse credibility finding is erroneous and would not have been made if he had been competently represented. The respondent argues that his former counsel was unprepared and that she made tactical errors in addressing or failing to address the government's use of the transcript from his credible fear interview to impeach his testimony. It was these tactical errors, the respondent posits, that caused him to be found incredible.

The respondent has not demonstrated that the Immigration Judge's adverse credibility finding was based upon anything other than a lack of consistent and credible testimony on his own part. In this regard, the record indicates that the respondent had the opportunity to explain the discrepancies during his hearing and that his former attorney filed a detailed brief on appeal contesting the Immigration Judge's adverse credibility finding. Neither the Immigration Judge nor the Board found the respondent's explanations to be sufficient to ameliorate any credibility concerns. Moreover, in his motion, the respondent has not offered any additional evidence or argument that could alter the result in his case. He has not provided a statement clarifying the inconsistent statements he made during his hearing and credible fear interview, and he has not submitted documentary evidence to bolster his otherwise incredible testimony. Based on the foregoing, we cannot conclude that the respondent was prejudiced by his former attorney's actions. See *Rashid v. Mukasey*, *supra*. He cannot, therefore, prevail on an ineffective assistance of counsel claim. *Id.*

The respondent also has not presented sufficient information to establish that sua sponte reopening is appropriate in his case. Our discretion to reopen sua sponte is limited to cases where exceptional circumstances are demonstrated. See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). The respondent contends that exceptional circumstances exist in his case because he is now potentially eligible for adjustment of status based upon his marriage to a United States citizen.¹ Becoming potentially eligible for relief from removal after a final administrative order has been entered is common, however, and does not, in itself, constitute an exceptional circumstance warranting our consideration of an untimely motion. To hold otherwise would vitiate the statutory and regulatory deadlines, which are designed to bring finality to immigration proceedings. See *INS v. Doherty*, 502 U.S. 314 (1992) (stating that motions to reopen are especially disfavored in immigration proceedings because every delay works to the advantage of the deportable alien). Accordingly, we decline to exercise our sua sponte authority to reopen his proceedings. We instead deny the respondent's motion to reopen as untimely.

ORDER: The motion to reopen is denied.


FOR THE BOARD

¹ The respondent also requests sua sponte reopening based on his contention that he was denied due process because he did not receive a full and fair hearing. Our review of the record indicates otherwise; the respondent received a full and fair proceeding and had ample opportunity to present his case and establish eligibility for relief.

Falls Church, Virginia 22041

File: (b) (6) -- Houston, TX

Date: SEP 22 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Bashist M. Sharma, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Sri Lanka, timely moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to reapply for (b) (6). In our decision dated April 13, 2015, we dismissed his appeal from the Immigration Judge's February 25, 2013, decision which found him removable and denied his applications for (b) (6). The record before us does not contain a response from the Department of Homeland Security. The motion will be denied in part and granted in part.

I. (b) (6)

In the respondent's motion at 7-10 he argues that he establishes (b) (6). The Immigration Judge found that he did not establish (b) (6) and we did not disturb her finding (I.J. at 10-13; BIA at 2). He presents evidence (Motion Exhs. X7, X8, M, N, T, W) which was previously available and could have been presented for his February 20, 2013, merits hearing. We do not consider this evidence. 8 C.F.R. § 1003.2(c)(1). He also presents evidence (Motion Exhs. X6, O, P, Q, R, U, V, X, Y) published within 15 days of his February 20, 2013, hearing or after the hearing and concerning events in 2013, 2014, and 2015. However, any past persecution would have had to occur prior to when he left Sri Lanka in 2010, and so evidence concerning subsequent events is not material to his claim of (b) (6). We conclude that the respondent does not establish (b) (6).

The respondent does not make a prima facie showing of (b) (6). The Immigration Judge found and we concluded that he did not show (b) (6) (I.J. at 11-13; BIA at 3-4). His motion evidence does not provide this required (b) (6). The respondent's brother-in-law's wife states in her affidavit (Motion Exh. H) that the Sri Lankan (b) (6) of 2013. She further states that (b) (6). One of the respondent's friends gave him and his wife a house to stay in. The friend states in his affidavit (Motion Exh. I) that (b) (6) the respondent's brother-in-law was (b) (6) which caused the respondent's wife (b) (6). The respondent's wife told the friend in (b) (6) of 2013 that she and the children would (b) (6) in

the United States. The friend states that the respondent's wife (b) (6) of 2014. The (b) (6) (b) (6) the respondent and his brother-in-law because the brother-in-law's (b) (6) [I.J. at 4]. The motion evidence does not make a prima facie showing that (b) (6) to him.

II. (b) (6)

As discussed above, the respondent's brother-in-law (b) (6) of 2013, and has (b) (6). The respondent is similarly situated to his brother-in-law because (b) (6). He presents the Amnesty International Report 2014/15 (Motion Exh. V) which states at 123 (343) that (b) (6), which shifts the burden of proof to a (b) (6) (b) (6) of (b) (6). *Id.* We conclude that the respondent makes a prima facie showing that (b) (6) removed to Sri Lanka. We will thus deny his motion to reopen to reapply for (b) (6), grant his motion to reopen to reapply for (b) (6) and will remand the record to the Immigration Judge for further proceedings.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen to reapply for (b) (6) is denied.

FURTHER ORDER: The motion to reopen to reapply for (b) (6) is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Philadelphia, PA

Date: NOV 10 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: David Bennion, Esquire

ON BEHALF OF DHS: John B. Carle
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6) under section (b) (6) of the Act;
voluntary departure under section 240B(b) of the Act; reopening

The United States Court of Appeals for the Third Circuit has remanded this matter to this Board for further consideration of the respondent's appeal of the decision of the Immigration Judge, dated November 28, 2012, denying his request for (b) (6) under the provisions of section (b) (6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and granting his alternative request for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b).¹ (b) (6) (3d Cir. (b) (6) 2015) (order). The respondent has also filed a motion to reopen and remand with this Board. The respondent's appeal, which is opposed by the Department of Homeland Security ("DHS"), will again be dismissed. His motion, which is also opposed by the DHS, will be denied. As the respondent has presented evidence that he posted the requisite voluntary departure bond, we will provide him with an additional 60 days to voluntarily depart this country, the maximum period allowed by section 240B(b)(2) of the Act.

¹ The respondent, through counsel, has conceded that he is subject to removal from the United States because he is an alien who is present in this country without being admitted or paroled by an immigration officer or who arrived at any time or place other than as designated by the Attorney General (I.J. at 1-2; Tr. at 3; Exh. 1). See section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). To the extent that the Third Circuit has also remanded the record to consider the respondent's eligibility for (b) (6) through counsel, he previously conceded that such a request is untimely and that there are no qualifying grounds upon which he could present an untimely request (I.J. at 6; Tr. at 11). See sections (b) (6) of the Act, (b) (6). The respondent has also withdrawn any claim to (b) (6) (Tr. at 11-12).

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). As the respondent's Application for (b) (6) was filed on or after May 11, 2005, it is subject to the provisions of the REAL ID Act of 2005. It is the respondent's burden to establish eligibility for relief from removal. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

Notwithstanding issues concerning credibility and corroboration, for purposes of establishing eligibility for (b) (6) under section (b) (6) of the Act, we conclude that the Immigration Judge properly denied the respondent's request for (b) (6) because he has not established that he is a (b) (6). In his appeal brief, filed with this Board on April 26, 2013, the respondent has identified (b) (6)

(Respondent's Br. at 5; I.J. at 14; Tr. at 55). See (b) (6) (BIA 2009) (holding that an applicant for (b) (6) should provide the exact delineation of (b) (6)). An applicant for (b) (6) must establish that (b) (6)

in question. (b) (6) (BIA 2014).

The respondent's arguments on appeal do not persuade us that (b) (6) El Salvador. To have (b) (6), "there must be evidence showing that (b) (6) (b) (6) (BIA 2014). The issue of (b) (6) will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information. (b) (6) (BIA 2014). While the respondent contends that (b) (6) (Respondent's Br. at 5), he does not identify any evidence contained in the record which indicates that (b) (6)

. See (b) (6) ("A (b) (6)"); see also (b) (6) (BIA 1980) (recognizing that the statements of counsel are not evidence). Moreover, even though the respondent contends that (b) (6) (Respondent's Br. at 5), whether a (b) (6) purposes is determined by the (b) (6), rather than by the (b) (6).

The respondent's (b) (6) is also impermissibly circularly defined in terms of the claimed (b) (6). (b) (6) (3d Cir. 2012) (recognizing that, because the complained-of (b) (6) must (b) (6) and not vice-versa, an alien cannot circularly define (b) (6)); (b) (6) (3d Cir. 2009) (rejecting a claim where the alien used (b) (6)). Like (b) (6) (3d Cir. 2003), the respondent has not

(b) (6)

shown that his (b) (6)

exists independently of the claimed

(b) (6). By its own definition, the (b) (6) existence is dependent

(b) (6).

For the reasons set forth above, we conclude that the respondent has not demonstrated that (b) (6)

constitutes a (b) (6)

has not been shown to be

(b) (6)

by

the claimed (b) (6). As such, we will not disturb the Immigration Judge's decision to deny the respondent's request for (b) (6) under section (b) (6) of the Act.

The respondent has not established that reopened and remanded proceedings are warranted. The respondent has presented evidence that, subsequent to the commencement of these removal proceedings, he married a lawful permanent resident who, in turn, has filed a Petition for Alien Relative (Form I-130) on his behalf. If proceedings were reopened and remanded, the respondent would request administrative closure in order to file an Application for Provisional Unlawful Presence Waiver (Form I-601A) with United States Citizenship and Immigration Services ("USCIS") before returning to El Salvador in order to undergo consular processing. See 8 C.F.R. § 212.7(e)(1) (granting USCIS exclusive jurisdiction to adjudicate Forms I-601A), (4)(v) (providing that, if an alien is in removal proceedings, he is ineligible to file a Form I-601A unless the removal proceedings have been administratively closed). In some instances, this Board has determined that removal proceedings may be administratively closed or continued in order to allow an alien to pursue an immigration benefit before USCIS. See, e.g., *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

At the present time, aliens, such as the respondent, who are married to lawful permanent residents are not eligible to file a Form I-601A. See 8 C.F.R. § 212.7(e)(3)(iii) (requiring an alien to qualify as an immediate relative under section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i), in order to file a Form I-601A). The DHS has proposed allowing certain spouses of lawful permanent residents to file a Form I-601A. See *Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*, 80 Fed. Reg. 43,338 (July 22, 2015). However, a final regulation has not been implemented which would benefit the respondent.

We need not consider the likelihood of the I-130 being approved because even if the Form I-130 was approved and the proposed regulations expanding the eligibility of provisional unlawful presence waivers were implemented, the respondent has not established that he would be able to demonstrate the requisite extreme hardship to his spouse.² See 8 C.F.R. § 212.7(e)(3)(vii); see also section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v); 8 C.F.R. § 212.7(e)(3)(vi) (proposed rule). The respondent, through counsel, has claimed that he

² The DHS has announced that it intends to issue guidance and regulations which "clarifies the meaning of the 'extreme hardship' standard that must be met to obtain a waiver." See USCIS website, Executive Actions on Immigration, available at <http://www.uscis.gov/immigrationaction>. However, we are unaware of any formal guidance or proposed regulation which formally alters the extreme hardship standard. In prior proposed rules, the DHS indicated that it would not modify the extreme hardship standard. See *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 77 Fed. Reg. 19,902, 19,907 (April 2, 2012) (proposed rule).

has resided with his spouse since 2008, acts as a surrogate father to her child, and financially supports his spouse and her child (Respondent's Motion at 9). While we are not unsympathetic to the claimed hardship, the respondent's arguments on appeal do not persuade this Board that he will likely be able to demonstrate to USCIS that the denial of his application for admission would result in extreme hardship to his spouse. *See, e.g., Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) (identifying the factors to be used in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

The respondent has also not established that USCIS will likely grant his Form I-601A as a matter of discretion. *See* 8 C.F.R. § 212.7(e)(7); *see also* 8 C.F.R. § 212.7(e)(7) (proposed rule). Despite his claimed equities, such as his marriage to a lawful permanent resident, residence in this country for many years, and claimed rehabilitation, the respondent was convicted of driving under the influence of alcohol in 2006 and 2010 (I.J. at 5-6). As discussed by the DHS in its opposition to the respondent's motion, while USCIS has proposed expanding the availability of unlawful presence waivers, the DHS, as a whole, has designated aliens who have been convicted of drunk driving as a priority for removal (DHS's Opposition to Respondent's Motion at 2). *See* Memorandum from Jeh Charles Johnson, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) (designating aliens who have been convicted of driving under the influence as "Priority 2" aliens for removal from this country). Drunk driving is an extremely dangerous crime. *Begay v. United States*, 553 U.S. 137 (2008). Considering these circumstances, we agree with the DHS that the respondent's criminal record will most likely bar his relief. *See, e.g., Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) (holding that the grant of a waiver of inadmissibility under former section 212(c) of the Act requires a balancing of favorable and unfavorable factors).

Ultimately, the respondent's motion does not establish *prima facie* eligibility for relief from removal. *See Shardar v. Att'y Gen. of U.S.*, 503 F.3d 308, 312 (3d Cir. 2007); *Guo v. Ashcroft*, 386 F.3d 556, 563 (3d Cir. 2004) (holding that the *prima facie* case standard for a motion to reopen requires the applicant to produce objective evidence showing a "reasonable likelihood" that he can establish that he is entitled to relief); *cf. Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002). His potential eligibility for relief rests upon a chain of speculative events, i.e., the issuance of final regulations expanding the availability of unlawful presence waivers, the approval of a Form I-130, a showing of extreme hardship to his spouse, and a showing that he warrants a waiver as a matter of discretion. The respondent has not shown that there is a sufficient likelihood that each of these events will occur so as to show a reasonable likelihood that he will succeed on the form of relief sought. Considering these circumstances, the respondent has not established that these proceedings should be reopened and remanded.

For the reasons set forth above, we once again affirm the Immigration Judge's decision to deny the respondent's request for (b) (6) and enter a voluntary departure order in this case. As the respondent has not established that reopened and remanded proceedings are warranted, the following orders are entered.

ORDER: The respondent's appeal is dismissed.


FURTHER ORDER: The respondent's motion to reopen and remand is denied.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). See section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. See 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. See 8 C.F.R. § 1240.26(i).



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Las Vegas, NV

Date:

OCT 30 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ian E. Silverberg, Esquire

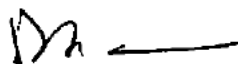
APPLICATION: Reopening, administrative closure

This case was last before us on July 6, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), as abandoned but granting his request for voluntary departure. On July 29, 2015, the respondent filed a timely motion to reopen. The Department of Homeland Security (DHS) has not responded to the respondent's motion. The respondent's motion to reopen will be denied.

The respondent is a native and citizen of Mexico. In his motion, he asks that his case be reopened in light of his approved application for (b) (6). He has submitted proof of his approval, and he notes that he will seek administrative closure of his proceedings once his proceedings are reopened.

Administrative closure is a tool used to regulate proceedings, that is, to manage an Immigration Judge's calendar or to manage the Board's docket. *See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). Administrative closure temporarily removes a case from a calendar or docket and does not result in a final order. *See id.* In the matter before us, there is already a final order, and there is nothing on the Board's docket to manage. Furthermore, the relief the respondent has obtained is administered solely by the DHS and does not require that proceedings be reopened. The relief is separate and apart from removal proceedings. We therefore conclude that administrative closure is not appropriate in this matter. Accordingly, we deny the respondent's motion to reopen.

ORDER: The respondent's motion to reopen is denied.



FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 23 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert J. Foss, Esquire

APPLICATIONS: (b) (6)

The respondent appeals the Immigration Judge's decision of January 6, 2016, which denied his applications for (b) (6). Sections (b) (6) of the Immigration and Nationality Act, (b) (6). The Department of Homeland Security (DHS) has not filed an opposition to the appeal. The appeal will be dismissed.

We review findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Honduras, applied for (b) (6). The Immigration Judge found that he was not credible and that he had not demonstrated that he was eligible for relief or protection. See I.J. at 3-18.

We find no clear error in the Immigration Judge's adverse credibility determination. See section (b) (6) of the Act; *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Shrestha v. Holder*, 590 F.3d 1034, 1042-43 (9th Cir. 2010). The Immigration Judge provided specific and cogent reasons to support her adverse credibility finding. See I.J. at 3-13.

For example, she cited numerous inconsistencies within the respondent's testimony and between his testimony, his (b) (6) statement, his (b) (6) statement, and his documentary evidence. These inconsistencies include whether the respondent was (b) (6) for six months in 2011 (b) (6) because of

(b) (6)

the distance, whether (b) (6) [REDACTED]
[REDACTED] in 2011 and continue (b) (6) [REDACTED] before
the respondent came to the United States in 2014, whether (b) (6) [REDACTED]
[REDACTED] since 2011 except for (b) (6) [REDACTED]
respondent was (b) (6) [REDACTED] in 2014 (b) (6) [REDACTED] or that the
respondent and the other members of his family (b) (6) [REDACTED]
[REDACTED], whether the respondent's brother and two sisters
resided with him in the family's home (b) (6) [REDACTED] in 2011 or
whether his brother resided in Mexico since 2011 and his older sister resided for a time in a
different town in Honduras, and whether his older sister was (b) (6) [REDACTED]
since 2011 or that she was (b) (6) [REDACTED]
[REDACTED]. See I.J. at 3-12; Tr. at 62-75, 81-92, 96-99, 105-132; Exhibit 3; Exhibit 4(B), (C), and
(D).

We are not persuaded by the respondent's assertion that the Immigration Judge's adverse
credibility determination is not supported by substantial evidence, or that a careful examination
of the record shows that many cases of the contradictions found by the Immigration Judge are
not present at all or are based on a misstatement of the evidence. See Brief at 2-10. On the
contrary, a careful review of the record reflects that the Immigration Judge cited only some of
the many inconsistencies in the respondent's testimony. See, e.g., Tr. at 62-75, 81-92, 96-99,
105-132. An adverse credibility determination under the REAL ID Act may be based on
testimony regardless of whether it goes to the heart of an applicant's claim. See section
(b) (6) [REDACTED] of the Act; (b) (6) [REDACTED].

We are not convinced by the respondent's argument that the Immigration Judge attempted
to manufacture contradictions on some points, pounced on certain details, and was intent on
interpreting every nuance in a way that is inconsistent. See Brief at 4-9. Upon our de novo
review, we find that the inconsistencies cited by the Immigration Judge are significant and
material, particularly the inconsistencies regarding (b) (6) [REDACTED] that the respondent
claimed to (b) (6) [REDACTED]
[REDACTED]. See Tr. at 65-72, 74-75, 82-86, 90, 98-99, 105,
107-109, 112-114, 118-129. We find no merit in the respondent's assertion that any apparent
contradictions have either been explained, are minor inconsistencies, or have been manufactured
by the court's mischaracterization of the record. See Brief at 13. Considering the totality of the
circumstances before the Immigration Judge, we cannot conclude that her adverse credibility
finding is clearly erroneous. See I.J. at 3-12; section (b) (6) [REDACTED] of the Act; (b) (6) [REDACTED].

We are not swayed by the respondent's assertion that the Immigration Judge failed to
consider all the evidence and that the mischaracterization of the evidence prejudices him and
does not comport with fundamental fairness, violating his due process rights. See Brief at 13.
We concur in the Immigration Judge's determination that the respondent did not meet his burden
to establish his eligibility for (b) (6) [REDACTED]

(b) (6)

(b) (6), and did not meet the (b) (6)
(i.e., that (b) (6)
(b) (6)). See I.J. at 13-18; (b) (6)
(BIA 1995) (b) (6) claim
that lacks veracity cannot satisfy burden of proof necessary to establish eligibility for (b) (6) and
(b) (6); (b) (6) (9th Cir. 2011).

Upon our de novo review, we agree with the Immigration Judge that the respondent has not
met his burden to show that (b) (6)
upon his return. See I.J. at 18; (b) (6) (9th Cir. 2003) (upholding
denial of (b) (6) relief based on adverse credibility determination where (b) (6) claim
depended upon same evidence presented in support of (b) (6)). Accordingly, the respondent's
appeal will be dismissed.

ORDER: The appeal of the Immigration Judge's decision of January 6, 2016, is dismissed.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - San Antonio, TX

Date:

NOV - 2 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Bryan S. Johnson, Esquire

ON BEHALF OF DHS: Warren R. Kaufman
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on May 11, 2015, when we summarily dismissed the respondent's appeal. The respondent, a native and citizen of Honduras, has filed a timely motion to reopen, alleging ineffective assistance of prior counsel.¹ The Department of Homeland Security opposes the granting of the motion to reopen. The respondent has also filed a motion to consolidate proceedings.² The motion to consolidate will be denied. The motion to reopen will be granted.

The respondent seeks reopening based on alleged ineffective assistance of prior counsel. The respondent contends that prior counsel failed to file an appellate brief after indicating that a brief would be filed and also failed to meaningfully apprise the Board of the reasons underlying the respondent's appeal in the Notice of Appeal (Motion at 12). The respondent further contends that when his mother ("the applicant") followed up with her attorney to check on the status of the appeal, her attorney misrepresented the basis for the Board's denial (Motion at 18-19). Specifically, the respondent contends that although the appeal was summarily dismissed due to failure to provide a Notice of Appeal with sufficient facts and arguments to apprise the Board of the basis for his appeal and for failure to submit a brief, his attorney told the applicant that the

¹ Although the motion indicates that the respondent has been removed from the United States and is currently residing in Honduras, we note that the post-departure limitations on motions to reopen do not apply to statutory motions to reopen. See *Garcia-Carias v. Holder*, 697 F.3d 257, 264 (5th Cir. 2012) and *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012).

² The respondent is a (b) (6)-year-old child. His mother, (b) (6) is an applicant in (b) (6) proceedings. She filed a motion seeking to consolidate her proceedings with her son. Given the circumstances, the Immigration Judge agreed to consider these cases concurrently, although he issued two separate decisions (Tr. at 4-5, 17-18). See generally 8 C.F.R. § 1240.1 (a)(iv). As the proceedings are distinct, the motion to consolidate proceedings is denied. However, like the Immigration Judge, we will consider the cases concurrently and issue two separate decisions.

appeal had been dismissed because the Board did not agree with his arguments on appeal (Motion at 13-14). In support of his claims, the respondent has submitted copies of emails sent between the applicant and former counsel to corroborate that these statements were made (see Motion attachments at 21-24).


The respondent has complied with the procedural requirements for ineffective assistance of counsel claims before the Board (see Motion attachments at 1-14, 15-20, 25). See *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Moreover, we agree with the respondent that his proceedings were rendered fundamentally unfair by his attorney's conduct, because his failure to apprise the Board of the reasons for the appeal and his misrepresentation to the applicant that he had done so are manifestly prejudicial. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of B-B-*, 22 I&N Dec. 309, 311 (BIA 1998) (requiring ineffective assistance to be so egregious as to render the hearing unfair); *Matter of Lozada*, *supra*, at 640; see also *Ogbemudia v. INS*, 988 F.2d 595, 598 (5th Cir. 1993) (requiring an alien to demonstrate "substantial prejudice" in order to establish that a hearing is fundamentally unfair). Moreover, in light of evolving case law pertaining to the respondent's (b) (6) claim, counsel's failure to argue that the facts and evidence in the respondent's case could form the basis of a (b) (6) in light of (b) (6) (BIA 2014) is also prejudicial.

In view of prior counsel's ineffective assistance and the resulting prejudice, we will reopen proceedings and remand the record to the Immigration Judge for further consideration of the respondent's eligibility for relief. We express no opinion as to the respondent's ultimate eligibility for relief. In light of our disposition of this case, we need not reach the respondent's remaining arguments in his motion to reopen, many of which pertain to issues over which we do not have jurisdiction (Motion at 2-3).

ORDER: The motion to reopen proceedings is granted.

FURTHER ORDER: The motion to consolidate is denied.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – El Paso, TX

Date: JUN - 1 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mahfuzur Rahman, Esquire

ON BEHALF OF DHS: Rachel McDonald
Assistant Chief Counsel

APPLICATION: Reopening, reconsideration

This case was last before us on January 7, 2016, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his applications for (b) (6). On April 6, 2016, the respondent filed a motion to reopen and reconsider. The respondent also has requested a stay of removal. The Department of Homeland Security (DHS) opposes the respondent's motion. The respondent's motion to reopen and reconsider will be denied. The respondent's request for a stay of removal also is denied.

I. MOTION TO RECONSIDER

In his motion, the respondent has presented numerous arguments challenging the manner in which his proceedings were conducted and the Immigration Judge's adverse credibility finding. We consider these arguments a motion to reconsider our prior ruling in his case, but the motion is untimely. See section 240(c)(6)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6)(B); 8 C.F.R. § 1003.2(b)(2) (stating that a motion to reconsider "must be filed with the Board within 30 days after the mailing of the Board decision").

The statute and regulations do not contain exceptions to the filing deadline for motions to reconsider. The respondent also has not explained the untimeliness of his motion or asked us to consider his arguments pursuant to our sua sponte authority. Further, even if the respondent's motion had been timely, the respondent has not raised any arguments that either were not or could not have been raised on appeal.¹ See generally *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006) (indicating that a motion to reconsider is neither a vehicle for advancing supplemental legal arguments that could have been raised previously nor a mechanism for

¹ To the extent that the respondent is claiming that certain arguments were not raised on appeal due to errors of his former attorney, we have considered this argument in addressing the respondent's motion to reopen due to ineffective assistance of counsel.

submitting a late-filed brief). Accordingly, the respondent has not met his burden of establishing that reconsideration of our prior decision in his case is warranted. We therefore deny the respondent's motion, to the extent that it is a motion to reconsider, as untimely.

II. MOTION TO REOPEN

Unlike his request for reconsideration, the respondent's request for reopening is timely. *See* section 240(c)(7)(C)(i) of the Act. The respondent, however, has not met his burden of establishing that reopening is warranted in his case.

In his motion to reopen, the respondent claims that he was the victim of ineffective assistance of counsel both before the Immigration Judge and on appeal. He claims that both attorneys who represented him in his prior proceedings failed to represent him effectively and to work diligently on his case. He lists a number of grievances against his prior representatives and appears to claim that their disbarment provides sufficient support for reopening his proceedings.

The respondent has not submitted evidence to support his claims that his prior attorneys have been disbarred. Further, the respondent has not complied with the procedural requirements that must be met before we will consider a claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637, 639-40 (BIA 1988); *see also Lara v. Trominski*, 216 F.3d 487, 496-99 (5th Cir. 2010) (discussing reasoning behind *Matter of Lozada*, *supra*, and finding its application to motion to reopen appropriate). In particular, the respondent has not submitted (1) an affidavit setting forth in detail the agreement that he entered into with his counsel; (2) evidence showing that his attorneys have been informed of the allegations leveled against them and that they have been given an opportunity to respond; or (3) evidence that a complaint has been filed with the appropriate disciplinary authorities, or an explanation for the lack of a complaint.² *Id.* at 639.

Without the information generated by compliance with these requirements, we cannot determine whether the mistakes the respondent identifies were due to his former attorneys or due to lack of diligence or lack of credibility on his part. *See Hernandez-Ortez v. Holder*, 741 F.3d 644, 648 (5th Cir. 2014) (upholding application of *Lozada* requirements). For instance, the attorney who represented the respondent during his hearing before the Immigration Judge only asked limited questions regarding the respondent's (b) (6) claim and did not seek to clarify some of the discrepancies identified by the Immigration Judge. The attorney who represented the respondent on appeal did contest the Immigration Judge's adverse credibility finding, but the respondent now has presented several new arguments addressing specific discrepancies cited by

² In its opposition to the respondent's motion, the DHS concedes that the respondent's statement, included as Exhibit A to his motion, is sufficient to constitute an affidavit setting forth in detail the agreement that the respondent had with his former attorneys. While the respondent's statement does contain some information, it does not describe in detail his arrangements with his former attorneys. In particular, the statement does not set forth precisely what the attorneys agreed to do for the respondent, what he agreed to do, and what he agreed to pay.

the Immigration Judge. The respondent's current arguments are not sufficiently persuasive to convince us that the prior adverse credibility finding in his case was clearly erroneous. Moreover, without further information, including compliance with the *Lozada* requirements, we are unable to discern whether the conduct of the respondent's prior attorneys was error or simply a consequence of the respondent's lack of credibility, and the combination of the record and the respondent's motion is not sufficient to convince us that the respondent was deprived of a full and fair hearing.³

The respondent also claims that he is entitled to reopening on the basis of new and previously unavailable evidence relevant to his (b) (6) claim. The respondent asserts that (b) (6) Bangladesh have (b) (6) since his final hearing before the Immigration Judge in July 2015. In particular, he claims that (b) (6) and the constitution by (b) (6). In addition, he contends that the (b) (6) 2016 and (b) (6) his uncle, the (b) (6). The (b) (6) that, if the respondent returns to Bangladesh, (b) (6).

In support of his claims, the respondent has offered an article from the Economist that predates his hearing before the Immigration Judge and therefore is not new or previously unavailable (Respondent's Motion, Tab J). See 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"). He also has submitted the 2014 Human Rights Report from the United States Department of State, but the DHS included this report in the background evidence it submitted during the respondent's hearing (Exhibit 3, at 46).

The only new and previously unavailable evidence he has provided regarding conditions in Bangladesh is the evidence in Exhibits B, C, D, and E, which includes statements from his brother, his uncle, a neighbor and a doctor. The respondent's brother did not (b) (6) (Respondent's Motion, Exhibit B). Accordingly, his statement provides little, if any, support for the respondent's claims. Similarly, the doctor did not (b) (6), so his statement does not confirm the respondent's claims regarding (b) (6) (Respondent's Motion, Exhibit E).

The respondent's uncle and neighbor did experience or view (b) (6) the respondent's uncle, but neither source is objective. Further, the event they describe is meant to bolster the respondent's prior (b) (6) claim, but the Immigration Judge found the respondent's

³ The respondent has resubmitted many of the documents he provided during his hearing with his motion to reopen. Some of the documents pertaining to (b) (6) appear to be new, but he has not established that these documents were previously unavailable. Further, because he did submit numerous documents during his hearing, he cannot fault his prior attorneys for his failure to produce any new but previously available documents, and he has not done so.

testimony in support of this claim not credible. Given these facts, the statements are not sufficient to meet the respondent's burden of showing that the result in his case would likely change if his proceedings were reopened. *See Matter of Coelho*, 20 I&N Dec. 464, 471-73 (BIA 1992) (indicating that an alien seeking reopening for further consideration of an application for relief bears a "heavy burden" and must present evidence of such a nature that the Board is satisfied that if proceedings are reopened, the new evidence would likely change the result in the case).

Based on the foregoing, we deny the respondent's motion to reopen based both on a claim of ineffective assistance of counsel and a claim of new and previously unavailable evidence.

ORDER: The respondent's motion to reopen and reconsider is denied.

FURTHER ORDER: The respondent's request for a stay of removal is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Orlando, FL

Date:

MAR 30 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Laura Elizabeth Vittetoe, Esquire

ON BEHALF OF DHS: David Delgado
Assistant Chief Counsel

CHARGE:

- Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (sustained)
- Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (withdrawn)
- Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation (withdrawn)

APPLICATION: Reopening

Although the respondent, a native and citizen of Costa Rica, has appealed from the November 21, 2014, decision of the Immigration Judge, he has neither alleged any error of fact or law in the Notice of Appeal (Form EOIR-26), nor supported the appeal with a supplemental brief. Accordingly, the respondent's appeal will be dismissed. See 8 C.F.R. § 1003.3(b); see also *Bonne-Annee v. INS*, 810 F.2d 1077, 1078 (11th Cir. 1987).

The respondent has, however, submitted a motion to reopen during the pendency of the appeal, which is treated as a request for a remand based on the new evidence provided therewith. See 8 C.F.R. § 1003.2(c)(4). The evidence has been presented to show that the respondent's (b) (6) 2012, convictions for contributing to the delinquency or dependency of a minor and trespass on school grounds or facilities in violation of Florida Statutes §§ 827.04(1)(a)/26.012, 810.097(1)/26.012 have been vacated for "fundamental due process violations" (Respondent's M.T.R. at Exh. 4 ("Agreed Order on Defendant's Motion for Clarification")).¹

¹ The Notice to Appear initially alleged that on (b) (6) 2012, the respondent was also convicted of possession with intent to sell, manufacture, or deliver marijuana in violation of Florida Statutes § 893.13(1)(c)2 (Exh. 1). This was charged in count one of the five count Felony Information, but the criminal judgment only reflects convictions under counts two through four (Exh. 5 at Tad D pp. 27-30). Hence, this factual allegation and the related charges
(continued...)

See *Garces v. United States Attorney General*, 611 F.3d 1337, 1344-45 (11th Cir. 2010). The evidence has also been presented to show that the amount of marijuana involved in the criminal proceedings was less than 30 grams and that, therefore, the respondent is eligible to apply for adjustment of status with a waiver of inadmissibility if the motion is granted (Respondent's M.T.R. at Exh. 4). See sections 245(a) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1255(a), 1182(h). However, the motion will be denied.

The evidence presented is insufficient to persuade us to grant the respondent's motion to remand for several reasons. First, the conviction documents in the record of proceeding reflect that the respondent was convicted on (b) (6), 2012 (Exhs. 2 and 5 at Tab D). Yet the February 17, 2015, Agreed Order on Defendant's Motion for Clarification reflects that the conviction was entered 1 year later than that on (b) (6) 2013. Far from explaining or even acknowledging this discrepancy, the respondent has carried this discrepant date of conviction over into the motion to remand (Respondent's M.T.R.). Further, no copy of the actual Motion for Clarification has been provided; nor has the respondent clarified what the "fundamental due process violations" were that led the criminal court to issue this order. Additionally, the order lacks any explanation for why the State attorney stipulated to the 25 gram amount of marijuana (especially since the respondent was not convicted under the possessory count in the Felony Information).² Thus, this evidence is not sufficiently reliable and detailed to warrant reopening the case under the circumstances.

Were this evidence probative of the respondent's deportability, as opposed to his eligibility for discretionary relief from removal, we might have taken a more liberal view of the evidence. But the respondent is deportable as a nonimmigrant visa overstay pursuant to section 237(a)(1)(B) of the Act, 8 U.S.C. § 1227(a)(1)(B), and this evidence is irrelevant to that fact (I.J. at 2; Exh. 1).

As evidence of the respondent's eligibility for discretionary adjustment of status with a waiver of inadmissibility, the Agreed Order on Defendant's Motion for Clarification is insufficient to justify remanding the record for further proceedings, even setting aside the discrepant conviction date and lack of explanatory detail in the order. First, the respondent was personally served with the Notice to Appear on February 9, 2012 (Exh. 1). There were eight hearings held during the course of the removal proceedings from February 21, 2012, until the final hearing on November 21, 2014. The record reflects that the respondent appreciated the significance of the removal proceedings from the outset (Tr. at 3). Yet inexplicably, the respondent did not seek and obtain the February 17, 2015, Agreed Order on Defendant's Motion

(...continued)

of deportability were withdrawn at the initial master calendar hearing on February 21, 2012 (Tr. at 5-6). Nevertheless, the respondent inexplicably concedes in the motion that he has a "conviction for possession" of marijuana (Respondent's M.T.R.).

² The complaint/arrest affidavit reflects that the respondent had 46.5 grams of marijuana, scales, and a bag of plastic bags at the time of his arrest on (b) (6) 2011 (Exh. 5 at Tab D p. 29).

for Clarification until *after* the completion of the proceedings before the Immigration Judge (Respondent's M.T.R.).

Under 8 C.F.R. § 1003.2(c)(1), a motion to reopen "shall not" be granted unless the pertinent evidence "was not available and could not have been discovered or presented at the former hearing[.]" See also *Faddah v. INS*, 580 F.2d 132, 133 (5th Cir. 1978); *Sakhawati v. Lynch*, --- F.3d ---, 2016 WL 946202 at *4 (6th Cir. Mar. 14, 2016); cf. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Although the respondent claims through counsel to have filed "multiple" prior motions in criminal court, all of which were unsuccessful, the respondent has not supported this claim with any evidence (Respondent's M.T.R.). See *INS v. Phinpathya*, 464 U.S. 183, 188 n. 6 (1984); *Tang v. INS*, 223 F.3d 713, 720 (8th Cir. 2000); *Brown v. INS*, 775 F.2d 383, 388 (D.C. Cir. 1985); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The respondent has not provided any affidavits, copies of the claimed prior filings in criminal court, or any reasonable explanation for why the Agreed Order on Defendant's Motion for Clarification could not have been obtained prior to the close of the proceedings before the Immigration Judge – especially in view of the fact that the order relates to criminal proceedings that concluded prior to the initiation of the removal proceedings. Hence, the motion to reopen is subject to denial under the mandatory terms of the governing regulation. See 2A Norman J. Singer, *Sutherland Statutory Construction* § 57.03 (4th ed. 1984) ("The form of the verb used in a statute, i.e., something 'may,' 'shall' or 'must' be done, is the single most important textual consideration determining whether a statute is mandatory or directory.").

Finally, we also deny the motion to reopen in the exercise of discretion. See *INS v. Doherty*, 502 U.S. 314, 322-23 (1992). First, the respondent should have obtained the evidence that he now seeks to present while the proceedings were pending before the Immigration Judge, and he has not provided a reasonable explanation for his failure to have done so. Thus, he has not demonstrated due diligence. Cf. *Matter of Cardenas Abreu*, 24 I&N Dec. 795, 801 & n. 7 (BIA 2009), *rev'd on other grounds*, *Abreu v. Holder*, 378 F. App'x 59 (2nd Cir. 2010). Second, the respondent has accrued an extensive juvenile criminal record involving repeated retail thefts (pp. 38, 41-42, 45), repeatedly providing a false name to law enforcement (pp. 39-40, 45), repeated burglaries (p. 43-44, 49), and repeated violations of the terms of his probationary punishments (pp. 48, 50, 51) (Exh. 5 at Tab E pp. 38-51). In view of this extensive juvenile criminal record, the respondent should have supported the motion to remand with countervailing evidence of his discretionary fitness for lawful permanent residency. See generally *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970); see also *Elkins v. Moreno*, 435 U.S. 647, 667-68 (1978) (recognizing that criminal history constitutes an adverse discretionary factor weighing against adjustment of status). Instead, he has provided nothing of the sort. Accordingly, the following order will be entered.

ORDER: The respondent's motion to remand is denied, and the respondent's appeal is dismissed.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Detroit, MI

Date:

APR 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: George P. Mann, Esquire

APPLICATION: Reopening

On March 14, 2016, the respondent submitted a motion to reopen proceedings in which the Board dismissed his appeal on October 14, 2015. The motion will be denied.

The respondent's motion is untimely as it was filed more than two years after the Board's final administrative decision. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). However, he seeks reopening as he avers that conditions in his native Mexico have changed such that he is now eligible for relief. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.2(c)(3)(ii). The respondent also asks that proceedings be reopened so that they may be continued or administratively closed as he asserts that he is *prima facie* eligible to apply for the Department of Homeland Security's ("DHS") Deferred Action for Childhood Arrivals ("DACA") program.

To the extent that the respondent wishes to seek immigration benefits under DACA, the DHS has exclusive jurisdiction over the decision to grant an individual deferred action. *Matter of Bahta*, 22 I&N Dec. 1381, 1391-92 (BIA 2000); *Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982); *see also Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) ("As a practical matter, Immigration Judges and the Board have limited and finite adjudicative and administrative resources, and those resources are best allocated to matters over which we do have jurisdiction."). Neither the Immigration Judge nor this Board has authority to review the DHS's exercise of prosecutorial discretion. *Id.*; *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011); *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998). In this regard, we note that the respondent's reliance on unpublished Board decisions and our holding in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), is misplaced. In this regard, we initially observe that it is well-established that unpublished decisions of the Board are not binding precedent. *Matter of Echeverria*, 25 I&N Dec. 512, 519 (BIA 2011). Moreover, as we do not know the factual underpinnings of the noted cases, we are unable to evaluate their relevance to the respondent's case.

Further, while the respondent refers to the factors in *Matter of Avetisyan*, *supra*, he has not persuasively argued that these factors apply in his favor. In *Matter of Avetisyan*, *supra*, we noted that administrative closure temporarily removes a case from an Immigration Judge's active calendar in order to await an action or event "that is relevant to [the] immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Id.* at 695. Consideration should also be given to the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is

reinstated before the Board. *Id.* at 696. As noted, the decision to grant a request for deferred action lies within the exclusive jurisdiction of the DHS. *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982) (“[S]ince the respondent can request deferred action status at any stage in the proceedings, the immigration judge did not err in refusing to adjourn the hearing to allow him to pursue that relief.”). As an order of removal does not preclude the government from adjudicating an application for deferred action, the respondent has not shown how a decision on his DACA application would be relevant to the proceedings. As such, proceedings need not be administratively closed for the respondent to have his DACA application adjudicated.

Furthermore, to date the DHS has not indicated that it intends to defer action in this case. Therefore, approval of a DACA application was and continues to be speculative. Moreover, as noted, the respondent can continue to pursue DACA in spite of his order of removal. Should it become necessary, a request for a stay of removal pending consideration of an application for relief that is before USCIS can be addressed to the DHS. 8 C.F.R. §§ 241.6(a) and 1241.6(a). Therefore, we decline to sua sponte reopen and administratively close or otherwise remand the proceedings. *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (“As a general matter, we invoke our sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations.”); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); 8 C.F.R. § 1003.2(a).

We also find that the respondent has failed to carry his heavy burden of demonstrating that a (b) (6) has occurred in Mexico such that his filing delay should be excused. *INS v. Abudu*, 485 U.S. 94 (1988); *Matter of S-Y-G-*, 24 I&N Dec. 247, 251, 258 (BIA 2007). In this regard, we initially note that he cites changes in Mexico since the time of his departure from that country in 2001 or 2002 in support of his motion (Motion at 15). However, the issue is whether (b) (6) since the time of his April 29, 2014, hearing. To determine whether a (b) (6) for purposes of exempting the respondent’s motion from the noted statutory bar, we compare the evidence of country conditions submitted with the motion to those that existed at the time of his hearing. *Matter of S-Y-G-*, *supra* at 253.

In addition, an individual filing a motion to reopen based on (b) (6), but instead must offer reasonably specific information showing (b) (6).” (b) (6) (6th Cir. 2004). (b) (6) *Id.* (b) (6) (BIA 1985)). Thus, the fact that (b) (6) in Mexico (b) (6) is insufficient, by itself, to warrant reopening; the (b) (6) to the respondent’s situation. Section (b) (6) of the Act. He does not need to conclusively establish eligibility for relief to secure reopening. Rather, he needs only set out a prima facie case of his eligibility, by submitting objective evidence that shows a “reasonable likelihood” or “realistic chance” that he can later establish eligibility. *Yu Yun Zhang v. Holder*, 702 F.3d 878, 879 (6th Cir. 2012); *see also INS v. Doherty*, 502 U.S. 314, 323 (1992) (a movant’s failure to establish a prima facie case for relief is reason enough not to reopen).

The respondent's evidence demonstrates that (b) (6) in various parts of Mexico, including the respondent's native state of Veracruz, has been ongoing since well before his hearing (Motion, Tabs J/f-o, x). Other documents reflect that (b) (6) (Motion at 22, Tabs J/a-k, t). However, a (b) (6) exempting the respondent's motion from the statutory time-bar. The respondent also has not shown that these (b) (6).¹ We appreciate the respondent's concerns about (b) (6) in Mexico, including Veracruz. However, he has neither shown that a (b) (6) in Mexico, nor demonstrated that he has an (b) (6) as is required for (b) (6). Rather, he has not shown how his (b) (6). See (b) (6) (noting that "(b) (6) in a country and (b) (6) out of (b) (6) for purposes of establishing (b) (6) eligibility). Inasmuch as the respondent has not met his burden of proof for (b) (6) relief, it follows that he has also failed to satisfy (b) (6). (1984).

Finally, the respondent has not established that he (b) (6). Thus, as the respondent has neither shown (b) (6) in Mexico, nor demonstrated that he is prima facie eligible for relief from removal, his motion is not exempt from the statutory time limitation on motions to reopen. Accordingly, the following order shall be entered.

ORDER: The motion is denied.



FOR THE BOARD

¹ We observe that a 2014 article submitted by the respondent reflects that (b) (6) (Motion, Tab Y). However, the respondent is a native Mexican, and he has not shown that he would be (b) (6).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - Tacoma, WA

Date: OCT 15 2015

In re: (b) (6)

(b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] -
Controlled substance violation

APPLICATION: Reopening

In a March 17, 2014, decision, the Immigration Judge denied the respondent's application for (b) (6) to Colombia (b) (6). The Board dismissed the respondent's appeal of this decision on November 17, 2014. On May 11, 2015, the respondent submitted a motion to reopen his removal proceedings.² The Department of Homeland Security ("DHS") did not file a response to the respondent's motion. The record will be remanded for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met their relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge appears to have made a competency determination, but this analysis was not included in her March 17, 2014, decision, or reflected in the transcript in the record

¹ We note that the Immigration Judge's decision also listed the following aliases for the respondent: (b) (6)

(I.J. at 1).

² The respondent also submitted a brief requesting that he be granted conditional release from detention. However, as removal proceedings are separate and apart from bond proceedings, we lack jurisdiction to consider issues concerning the respondent's custody status in the instant removal proceedings. See 8 C.F.R. § 1003.19(d).

before us (Tr. at 25; Respondent's Brief at 7). Accordingly, we will remand the record in order for the Immigration Judge to make clear and specific findings on the threshold issue of the respondent's mental competency, and to identify the procedural safeguards applied, if appropriate. See *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). On remand, the parties and the Immigration Judge may also address the respondent's claim on appeal that he is a United States citizen. The following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Los Angeles, CA

Date: JUN 10 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Margarita M. Manduley, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: (b) (6)

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's October 27, 2014, decision denying her application for (b) (6) of the Immigration and Nationality Act, (b) (6), as well as her request for (b) (6). The appeal will be sustained, and the record will be remanded.

The respondent seeks (b) (6) and related relief based (b) (6) in Guatemala. In her decision, the Immigration Judge determined that the respondent did not comply with (b) (6) applications or demonstrate than (b) (6) (I.J. at 2). In the alternative, the Immigration Judge found that the respondent did not establish that she was eligible for relief because she did not establish that she (b) (6) (I.J. at 5-7).

The respondent challenges these findings on appeal (Respondent's Br. at 3-5, 7-15). Additionally, the respondent argues that she was denied a full and fair hearing before the Immigration Judge (Respondent's Br. at 5-7).

This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. See 8 C.F.R. § 1003.1(d)(3)(i); see also *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review questions of law, discretion, and judgment de novo. See 8 C.F.R. § 1003.1(d)(3)(ii). On review, we conclude that the respondent did not receive a full and fair hearing in this case.

At the beginning of the individual merits hearing, the respondent affirmed that everything in her (b) (6) application was true and correct to the best of her knowledge (Tr. at 23). The

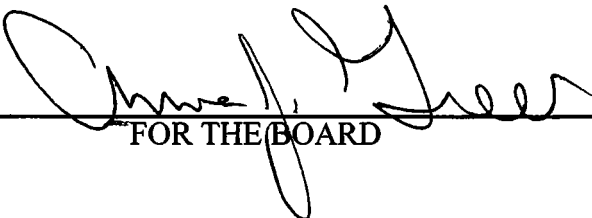
Immigration Judge then asked the respondent, "And if you were to testify today, would what you say today be exactly what you put in your declaration?" (Tr. at 23). The respondent answered in the affirmative. Thereafter, the Immigration Judge took the lead in questioning the respondent regarding certain dates and details relevant to her claim. At the conclusion of the Immigration Judge's questioning, she indicated that she would allow the Department of Homeland Security attorney to cross-examine the respondent on the facts stated her declaration and then allow the respondent's attorney to conduct redirect examination (Tr. at 33). Later, when the respondent's attorney challenged the Immigration Judge's decision in this regard, the Immigration Judge insisted that the respondent could add any clarifications to her declaration in writing, but could not testify beyond a redirect examination related to the facts already stated in her declaration (Tr. at 52-57). The Immigration Judge also insisted that the case must be completed on that date (Tr. at 53, 55).

It is well-settled that (b) (6) applicant *may* stipulate that her oral testimony would be consistent with her written assertions. (b) (6) ■ ■ ■ (9th Cir. 2000); (b) (6) (BIA 1989). However, there was no stipulation in this case. Rather, the Immigration Judge unilaterally restricted the presentation of the respondent's case without providing her the opportunity to develop the record by allowing counsel to conduct direct examination. The United States Court of Appeals for the Ninth Circuit has emphasized that "[a]n applicant's oral testimony is 'an essential aspect of (b) (6) adjudication process' and the refusal to hear that testimony is a violation of due process." (b) (6) ■ ■ ■ (9th Cir. 2013) (citing (b) (6)); *see also* (b) (6) (BIA 2014). Further, we conclude that the respondent was prejudiced by the Immigration Judge's actions in not allowing respondent's counsel to conduct direct examination of the respondent, despite being found credible. *Colmenar v. INS, supra*, at 971 (prejudice required for due process violation). We will accordingly remand the record to the Immigration Judge for a de novo hearing and for the entry of a new decision based on the entirety of the evidence including that which is produced on remand.

Accordingly, the following orders are entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Louisville, KY

Date:

MAR 14 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Wael M. Ahmad, Esquire

ON BEHALF OF DHS: Jonathan M. Larcomb
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Cancellation of removal; motion to remand

The respondent appeals the Immigration Judge's March 31, 2014, decision denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). During the pendency of her appeal, the respondent filed a motion to remand. The Department of Homeland Security ("DHS") opposes the motion. The motion will be denied, and the appeal will be dismissed.

Through her motion, the respondent argues that a remand is required based on her contention that her conviction for theft in violation of Kentucky Revised Statutes section 514.030, an undisputed crime involving moral turpitude, was set aside and she was permitted to enter "pretrial diversion." According to the respondent, her conviction was first set aside pursuant to Kentucky Civil Rules section 60.02(f) because she was unrepresented during her criminal proceedings and was not aware of the availability of "pretrial diversion." The respondent then entered into an agreement with the prosecutor to enter into "pretrial diversion," and her conviction was ultimately "dismissed" when she completed the "pretrial diversion" program. The respondent argues that her conviction is no longer a "conviction" for immigration purposes and she is eligible for cancellation of removal under section 240A(b) of the Act. In its opposition, the DHS argues that participation in "pretrial diversion" constitutes a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), and the respondent is still not eligible for cancellation of removal.

"The Kentucky General Assembly established the [pretrial diversion program] in 1998" *Com. v. Derringer*, 386 S.W.3d 123, 126 (Ky. Sup. Ct. 2012). "Pretrial diversion is an interruption of prosecution, which allows a defendant to avoid a criminal conviction on his record if he successfully completes diversion." *Id.* "As a condition of pretrial diversion, the defendant is required to enter an Alford plea or a plea of guilty." *Id.*; see also K.R.S. § 533.250(1)(f). If the defendant successfully completes the provisions of the pretrial diversion

agreement, "the charges against the defendant shall be listed as 'dismissed-diverted' and shall not constitute a criminal conviction." See *Com. v. Derringer*, *supra* (internal citations omitted). However, if the defendant fails to complete the provisions of the pretrial diversion agreement, the trial court voids the agreement, and the Commonwealth decides to proceed on the guilty plea, then "[Kentucky Revised Statutes section] 533.256 contemplates that the trial court will enter final judgment in accordance with the defendant's guilty plea." *Id.*

In this case, the record establishes that the respondent entered into a "pretrial diversion" agreement with the Commonwealth's attorney after having her original plea set aside and that the charges were "dismissed" after successful completion of diversion. However, pursuant to Kentucky law, the respondent was required to enter a plea to the charge as a condition of "pretrial diversion."¹ See *id.*; see also K.R.S. § 533.250(1)(f). The court was then required to set conditions upon the respondent's participation in "pretrial diversion," as included in the statute. See K.R.S. §§ 533.250(1)(h), 2(a) and (b), 3(a)-(c), (4), and (5).

Given that Kentucky law shows that the respondent was required to enter a plea to the charge and was then placed in a probationary status prior to dismissal of the charge, we find that the respondent remains "convicted," as defined by section 101(a)(48)(A), of an offense under section 237(a)(2)(A)(i) of the Act such that she is not eligible for cancellation of removal under section 240A(b) of the Act. See *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Luviano-Rodriguez*, 23 I&N Dec. 718 (BIA 2005); cf. *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989) (finding a conviction does not exist for immigration purposes where an alien's criminal charges were dismissed without prejudice following his successful completion of a pretrial intervention program where the alien was not required to enter a plea and court not required to determine guilt prior to dismissal of charges). The respondent does not make any other arguments.

Accordingly, the motion will be denied, and the appeal will be dismissed.

ORDER: The motion is denied, and the appeal is dismissed.


FOR THE BOARD

¹ Through her motion, the respondent asserts that a defendant is not required to enter a plea in order to participate in "pretrial diversion." See Respondent's Motion at 3. In its opposition, the DHS states that "pretrial diversion" is handled by the individual Kentucky county and that, in the county where the respondent was convicted, a plea is required. See DHS's Opposition at 3. However, pursuant to Kentucky Revised Statutes section 533.250(1), all Kentucky "pretrial diversion" programs "shall" contain as an element the requirement that the defendant enter a guilty plea or Alford plea. See *id.* The respondent has not submitted evidence that the county in which she was convicted does not follow the mandate of the applicable statute in requiring a plea. Hence, she failed to meet her burden of proof to show that she is eligible for relief.

Falls Church, Virginia 22041

File: (b) (6) – Florence, AZ

Date:

In re: (b) (6)

MAR 18 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

This case was last before us on July 11, 2012, when we dismissed the respondent's appeal from an Immigration Judge's February 23, 2012, decision determining that the respondent did not demonstrate eligibility for any relief from removal and ordering the respondent removed from the United States to Mexico. The respondent filed a unilateral motion to reopen on November 9, 2015, arguing that he is entitled to reopening pursuant to the *Franco* Reopening Agreement. The respondent's motion will be denied.

Under the *Franco* Reopening Agreement, approved by order of the United States District Court for the Central District of California on September 25, 2015, certain individuals who were detained by U.S. Immigration and Customs Enforcement in Arizona, California, and Washington on or after November 21, 2011, may file a motion to reopen with the Board or Immigration Court if the motion to reopen demonstrates that the individual meets the Class membership criteria and that the individual was not represented at the time the order of removal was entered before the Immigration Judge, and the motion to reopen sets forth argument or evidence showing that the individual has a plausible defense to removability or plausible grounds for relief. See Agreement Regarding Procedures for Notifying and Reopening Cases of *Franco* Class Members Who Have Received Final Orders of Removal, available at: www.justice.gov/eoir (hereinafter "*Franco* Reopening Agreement"), at 17-18; Notice of Proposed Partial Class Action Settlement for Individuals Who Have Serious Mental Disorders and Have Been Ordered Removed From the United States, available at: www.justice.gov/eoir (hereinafter "Notice").

The *Franco* Class is defined as "[a]ll individuals who are or will be in [Department of Homeland Security ("DHS")] custody for immigration proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings, and who presently lack counsel in their immigration proceedings." *Franco-Gonzalez v. Holder*, 2014 WL 5475097, *1, 12 (C.D. Cal. Oct. 29, 2014); *Franco* Reopening Agreement at 2; Notice. A "serious mental disorder" refers to individuals for whom certain specified diagnostic, medical, or other criteria are met. See *Franco* Reopening Agreement at 3; Notice.

The respondent's motion to reopen his removal proceedings will be denied. First, he has not submitted any evidence of "a serious mental disorder or defect." His motion does not identify any specific mental disorder or defect, and he did not submit any evidence from a qualified

mental health provider or documentation of a finding of incompetence from another court. See Instructions on How to File a Motion to Reopen Your Immigration Case Under the *Franco* Reopening Agreement, available at: www.justice.gov/eoir (explaining that “to show that you have a ‘serious mental disorder,’ you should include a letter or other documents from a ‘qualified mental health provider’”). Further, we have reviewed the record of proceedings, including our prior decision, the Immigration Judge’s decision, the appellate briefing, and the transcript, and do not discern any indicia of incompetency. As the respondent has not demonstrated that he suffers from or has suffered from a serious mental disorder or defect, he has not demonstrated that he meets the definition of a *Franco* Class Member.

Second, the respondent has not shown that if his proceedings were reopened, he would have a defense to removal or plausible grounds for relief. He asserts in his motion to reopen only that he “tried” for cancellation of removal while detained and the he “sent an application for (b) (6) to the 9th Circuit.” In our July 11, 2012, decision, we agreed with the Immigration Judge that the respondent is statutorily ineligible for cancellation of removal for nonpermanent residents because he did not establish 10 years of continuous physical presence in the United States immediately preceding the date of his application, as required by section 240A(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(A). We also concluded that the respondent did not demonstrate prima facie eligibility for asylum or related relief. The brief points made by the respondent in his motion to reopen are insufficient to show a defense to removal or plausible grounds for relief. We will therefore deny his motion to reopen removal proceedings.

Accordingly, the following order will be entered.

ORDER: The respondent’s motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Oklahoma City, OK¹

Date:

FEB 11 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christi J. Gideon, Esquire

APPLICATION: Reopening

The respondent has appealed from the Immigration Judge's December 19, 2013, decision denying his motion to reopen proceedings. A removal order had previously been entered at the conclusion of proceedings on September 16, 2013. The Board reviews findings of fact by the Immigration Judge for clear error, while all other issues, including whether the parties have met the relevant burden of proof, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). The respondent's appeal will be sustained and the record will be remanded for further proceedings.

Out of an abundance of caution, we will sustain the respondent's appeal and remand the record to the Immigration Court for further proceedings and the entry of a new decision. The record reflects that the respondent waived appeal at the conclusion of proceedings on September 19, 2013, and the Immigration Judge therefore did not prepare a full decision. However, we conclude that the pro se respondent's waiver of appeal was not knowingly and intelligently made. *See Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1323 (BIA 2000) (emphasizing the importance of advising a pro se alien of appeal options and the finality associated with a waiver of appeal). After consideration of the totality of the circumstances presented, we will sustain the appeal and remand the record for further proceedings, including the entry of a new decision that provides a basis for review of the issues presented. *See generally Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (noting the Board's limited fact-finding ability). On remand, an additional hearing should be scheduled so that the respondent may present any evidence that he wishes to be considered in support of his application for relief. A new decision should then be entered. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained and the record is remanded to the Immigration Court for further proceedings and for the entry of a new decision.



FOR THE BOARD

¹ The respondent appeared for his hearing in Oklahoma City, Oklahoma. The Immigration Judge conducted the proceedings remotely from Dallas, TX. *See* section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).

Falls Church, Virginia 22041

File: (b) (6) – Seattle, WA

Date: MAR 22 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Robert Pauw, Esquire

ON BEHALF OF DHS: Mark Hardy
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to reapply for (b) (6). In our decision dated July 27, 2015, we dismissed his appeal from the Immigration Judge's June 24, 2014, decision which found him removable, determined that his (b) (6) application was time-barred, and denied his applications for (b) (6). The Department of Homeland Security ("DHS") opposes the motion. The motion will be denied.

The respondent's motion to reopen filed on October 23, 2015, is timely. The respondent does not make a prima facie showing of eligibility for (b) (6). The first basis for his claims is (b) (6). He presents evidence (Motion Exh. 2) that his (b) (6) his family. However, as we stated in our July 27, 2015, decision at 2, he does not show that his (b) (6). His (b) (6) is based on the same facts as his (b) (6) claim. He does not show that (b) (6) would be with (b) (6).

The second basis for the respondent's claims is that he (b) (6) (Motion Exhs. 1-6). He asserts that he is in the (b) (6) who are deported to Mexico, are (b) (6). His (b) (6). Many individuals in Mexico have (b) (6). (b) (6). A 2015 <http://dartmouthbusinessjournal.com> article (Motion Exh. 5) at 2 (15) states that 25 percent of Mexicans may not (b) (6). (b) (6) are far from a (b) (6). (b) (6) (9th Cir. 2013). Instead, these (b) (6). *Id.*

(b) (6)

Even were we to assume that the respondent is a (b) (6) Mexico who (b) (6). If someone (b) (6) but also apply to (b) (6) is not because of (b) (6) and there is no basis to conclude that (b) (6). An (b) (6). *Id.*

The respondent's (b) (6) claim is based on the same facts as his (b) (6) claim. He does not show that (b) (6) – that is, that the (b) (6). (b) (6) (9th Cir. 2008).

In the alternative, the respondent moves for reopening and administrative closure. However, he does not show that he is pursuing any petition, application, or other action outside of removal proceedings which would affect the ultimate outcome of the proceedings. *See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). We decline to reopen and administrative close the proceedings.¹

Accordingly, the following order will be entered.

ORDER: The motion to reopen is denied.



FOR THE BOARD

¹ We are sympathetic to the respondent's (b) (6). However, any request for a favorable exercise of prosecutorial discretion or for deferred action would have to be pursued before the DHS.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - Seattle, WA

Date: **APR 28 2016**

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Henry Cruz, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Reopening

This case was last before us on October 15, 2015, when we dismissed the respondent's appeal from the Immigration Judge's March 4, 2015, denial of the respondent's applications for (b) (6) and cancellation of removal for certain non-permanent residents. See sections (b) (6) and (b) (6) of the Immigration and Nationality Act, (b) (6). On January 12, 2016, the respondent filed a timely motion to reopen proceedings, to which the Department of Homeland Security ("DHS") has not filed a response. The motion will be denied.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In support of his motion to reopen proceedings, the respondent submitted a (b) (6) 2015, forensic neuropsychological report from (b) (6) Ph.D., a clinical neuropsychologist, indicating that the respondent suffers from dementia and intellectual disability (Respondent's Motion to Reopen, Attach.). The respondent argues that these two new diagnoses, which did not appear in any of the respondent's prior mental health assessments, together with the assessment's additional narrative concerning the respondent's prognosis upon his return to Mexico, constitute new evidence that is material to the respondent's claim for (b) (6) and related relief (Respondent's Motion to Reopen at 10). We disagree.

First, the addition of dementia and intellectual disability diagnoses does not materially change the legal and factual background underlying the Immigration Judge's finding that the respondent did not demonstrate a reasonable possibility that he would be (b) (6) in Mexico (I.J. at 7-10; BIA at 1). As noted by the Immigration Judge and the Board, the respondent previously introduced evidence that he had been diagnosed with

cognitive disorder and acute adjustment disorder with anxiety and depressed mood, and that he demonstrated aggressive behavior, impulsiveness, and paranoia (I.J. at 7; BIA at 1-2; Exh. 5, Tab A at 16-39). Even assuming the new forensic neuropsychology report was previously unavailable, the respondent has not demonstrated that the additional diagnoses of dementia and intellectual disability are not merely cumulative in nature, but rather make it more likely that the respondent will be (b) (6) in Mexico. Further, although the updated assessment purports to find that the respondent's family members in Mexico will not be able to provide the respondent with adequate support in light of his cognitive deficits, such a finding, even if fully credited, does not alter the Immigration Judge's and Board's conclusion, which we found not to be clearly erroneous, that the respondent will not face a reasonable possibility of (b) (6) in Mexico (BIA at 2).

In his motion, the respondent also makes arguments concerning the nexus between (b) (6) specified in section (b) (6) of the Act, (b) (6). However, because we find that the respondent's new evidence does not affect the Immigration Judge's finding that he does not face a (b) (6) in Mexico, we need not address the respondent's arguments concerning nexus.

The respondent also claims in his motion that the Immigration Judge and the Board did not make explicit findings concerning the (b) (6) in Mexico. However, both the Board and the Immigration Judge found that, because the respondent did not show a (b) (6), and because his claim under (b) (6) hinges on such a possibility, he did not meet his burden to demonstrate a sufficient (b) (6). Further, nothing in the new assessment or the respondent's motion affects our conclusions concerning the respondent's application for relief under (b) (6). Accordingly, the respondent's motion will be denied.

ORDER: The respondent's motion to reopen his proceedings is denied.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Seattle, WA

Date:

JUN 22 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mary Beth Leeper, Esquire

ON BEHALF OF DHS: Mark Hardy
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6)

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's September 24, 2014, decision denying his applications for (b) (6). The respondent's appeal, which is opposed by the Department of Homeland Security ("DHS"), will be dismissed.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also* *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the respondent is statutorily barred from a grant of (b) (6) because he (b) (6) his application (b) (6) the date of his last arrival in the United States (I.J. at 2). *See* section (b) (6) of the Immigration and Nationality Act, (b) (6). On appeal, the respondent argues that the (b) (6) application is solely attributed to delays in the Immigration Court's scheduling, in that he filed his (b) (6) application during his first master calendar hearing which was scheduled approximately 2 years after he was placed in proceedings (Respondent's Brief at 9-10).

We agree with the Immigration Judge's determination that the respondent did not establish the existence of (b) (6) that would (b) (6) application (I.J. at 1-2). *See* section (b) (6) of the Act; (b) (6). The Immigration Judge found that the respondent's (b) (6) Mexico arose in mid-2012; however, he did not file his (b) (6) application until March 18, 2014 (I.J. at 1-2; Tr. at 13, 32). Before the Immigration Judge, the respondent explained that he did not file his (b) (6) application after (b) (6) in 2012 because he did not know how the law worked (I.J. at 2;

Tr. at 13, 32). We agree with the Immigration Judge that ignorance of the law does not constitute (b) (6) (I.J. at 2). See (b) (6) (9th Cir. 2003) ("As a general rule, ignorance of the law is no excuse."); see generally (b) (6) (1991).

In addition, the respondent's appellate argument, that he was unable to (b) (6) application until the date of his first master calendar hearing in 2014, also does not (b) (6) his (b) (6) (Respondent's Brief at 9-10). The regulations instruct that (b) (6) application shall be filed directly with the Immigration Court having jurisdiction over the underlying proceeding. (b) (6) However, the record does not reflect that the respondent attempted to file his application with the Immigration Court in a timely manner once he was placed into removal proceedings in 2012. There is no evidence that the respondent filed a motion requesting an earlier master calendar hearing in order to file his (b) (6) application or that he attempted to lodge his application with the Immigration Court prior to his scheduled hearing. See *Immigration Court Practice Manual*, § 4.15(I)(i) at 76-78 (Feb. 4, 2016), <https://www.justice.gov/eoir/office-chief-immigration-judge-0>.

Furthermore, assuming arguendo the respondent met the (b) (6), we agree with the Immigration Judge that he has not established his eligibility for (b) (6) (I.J. at 2-5). In order to establish eligibility for (b) (6), the respondent must be able to prove that (b) (6) (b) (6) of the Act. However, the respondent has not (b) (6) that is (b) (6).

Before the Immigration Judge, the respondent argued that he will (b) (6) to Mexico because, (b) (6) the United States, he (b) (6) and people in Mexico (b) (6) (I.J. at 2-4; Tr. at 8-13, 25, 27-28, 32-37).²

¹ On appeal, and in his pre-hearing brief before the Immigration Judge, the respondent proposed that he would be (b) (6) to the United States" (Respondent's Brief at 10; Respondent's Pre-Hearing Brief at 12-18). However, the respondent did not articulate this (b) (6) before the Immigration Judge at his individual hearing (Tr. at 4-38). Therefore, it is not appropriate for us to consider it for the first time on appeal. See *Matter of J-Y-C-*, *supra*, at 261 n.1 (noting that it is inappropriate for the Board to consider a claim for the first time on appeal that was not raised before the Immigration Judge). Moreover, such (b) (6) from the respondent's testimony before the Immigration Judge, examined in the instant order (I.J. at 2-4; Tr. at 8-13, 25, 27-28, 32-37).

² The respondent noted in his declaration in support of his (b) (6) application that he (b) (6) to Mexico because he believes the (b) (6) (Respondent's Supplemental Declaration at 12). However, the record reflects that the respondent did not develop this issue before the Immigration Judge; he did not present testimony regarding this aspect of his claim nor did he provide evidence corroborating his assertion. Similarly, on (continued...)

(b) (6)

We agree with the Immigration Judge that the respondent has not established that he (b) (6) in the Act (I.J. at 3-5).³

In order for a respondent to demonstrate that he is part of a (b) (6), he must show that the (b) (6), and we have defined (b) (6) to the individual's (b) (6). See (b) (6) (BIA 1985). In addition, the (b) (6) See (b) (6) (BIA 2014) (explaining that the (b) (6) it"); (b) (6) (BIA 2014) (explaining that (b) (6)). Moreover, (b) (6) requires that the (b) (6) See (b) (6) (BIA 2007) (holding that (b) (6)).

The respondent's assertion that he will (b) (6), does not meet the above requirements for a (b) (6). In (b) (6) (9th Cir. 2010), the United States Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, rejected a similarly described group, (b) (6). The respondent argues that (b) (6) has been overruled by the Ninth Circuit's more recent decision in (b) (6) (9th Cir. 2013) (Respondent's Brief at 10-12). We disagree.

In (b) (6), the Ninth Circuit rejected (b) (6). In (b) (6) the Ninth Circuit clarified its analysis regarding (b) (6), but continued to hold that (b) (6).

(...continued)

appeal, although the respondent briefly mentions this aspect of his claim, he has not meaningfully challenged that he will (b) (6) (Respondent's Brief at 5). Therefore, the issue is deemed waived. See *Matter of G-G-S*, 26 I&N Dec. 339, 340 n.2 (BIA 2014).

³ The Immigration Judge found that the respondent was not (b) (6) Mexico, and the respondent does not contest this finding on appeal (I.J. at 3).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date: FEB 29 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Ramiro Castro, Esquire

ON BEHALF OF DHS: J. Mark Kang
Assistant Chief Counsel

APPLICATION: (b) (6)

The respondent, a native and citizen of El Salvador, has appealed the Immigration Judge's decision dated April 9, 2015, which denied his applications for (b) (6) pursuant to section (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6) pursuant to section (b) (6) of the Act (b) (6) and (b) (6) pursuant to (b) (6). The Department of Homeland Security ("DHS") has requested that the Immigration Judge's decision be affirmed. The record will be remanded.

There is evidence in the record indicating that the respondent was, at one point, determined to be an (b) (6) (Discharge Notification Form (April 23, 2012)). Our records indicate that the respondent initially filed (b) (6) with the United States Citizenship and Immigration Services ("USCIS") on December 28, 2012 (Exh. 2; I.J. at 2-3; Tr. at 3), before filing another (b) (6) application with the Immigration Court on April 3, 2013 (Exh. 3), and that he filed another application with USCIS on August 12, 2015, during the pendency of this appeal. We find that there is a threshold issue to be addressed regarding initial jurisdiction over the respondent's application for (b) (6) in light of the provisions of (b) (6), and the procedures set forth by the USCIS relating to the adjudication of (b) (6) filed by (b) (6).

Section (b) (6), codified at section (b) (6) of the Act, provides that (b) (6) ... shall have initial jurisdiction over (b) (6) filed by an (b) (6) The term "(b) (6)" is defined in the Act by reference to "(b) (6) of the Homeland Security Act of 2002 (b) (6)", which in turn defines the term as (b) (6).

The USCIS subsequently issued a memorandum regarding updated procedures for determining initial jurisdiction over (b) (6). Memorandum from Ted

Kim, USCIS Acting Chief, (b) (6) Division (May 28, 2013), *Updated Procedures for Determination of Initial Jurisdiction over* (b) (6), HQRAIO 120/12a ("USCIS memo"). This memorandum states that, effective June 10, 2013, in cases in which the Customs and Border Protection ("CBP") or Immigration and Customs Enforcement ("ICE") has already made a determination that an applicant is a (b) (6), "and that status determination was still in place on the date the (b) (6) application was filed, (b) (6) will adopt that determination without another factual inquiry." *Id.* at 1-2. The memo goes on to state that "[u]nless there was an *affirmative act* by [Health and Human Services], ICE or CBP to terminate the (b) (6) finding before the applicant filed the initial application for (b) (6) will adopt the previous DHS determination that the applicant was a (b) (6)" and "will take jurisdiction over the case." *Id.* at 2 (emphasis supplied). The memo further explains that in such cases, where there is a prior (b) (6) determination which is still in place at the time the (b) (6) application is filed, USCIS will take initial jurisdiction over the case "even if there appears to be evidence that the applicant may have turned 18 years of age or may have reunited with a parent or legal guardian" since the (b) (6) determination was made. *Id.*

Neither Immigration Judges nor this Board are bound by the USCIS memo cited above. *See, e.g., Matter of C. Valdez*, 25 I&N Dec. 824, 826 n.1 (BIA 2012) (noting that a USCIS policy memorandum was persuasive, but not binding). However, as USCIS is the agency vested with initial jurisdiction over (b) (6) applications, we would defer to USCIS's determination of whether it retains jurisdiction over the initial adjudication of an (b) (6) application.

On the record before us, we conclude that a remand is necessary for a determination whether this is a case in which the USCIS would take initial jurisdiction over this respondent's application for (b) (6). In this regard, further fact-finding is needed 1) whether the respondent was determined to be a (b) (6) prior to the initial filing of his (b) (6) application; 2) if so, whether that status has been terminated by an "affirmative act" within the contemplation of the USCIS memo; and 3) whether the announced position of the USCIS as set forth in the USCIS memo has been withdrawn or superseded.

If this respondent comes within the scope of the USCIS memo, the respondent shall be provided the opportunity to pursue an application for (b) (6) before the USCIS. If after additional fact-finding, it is determined that the respondent does not fall within the provisions of this policy memo, the Immigration Judge may certify the case back to the Board. 8 C.F.R. § 1003.7.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date:

JUN 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Don P. Chairez, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Remand; (b) (6)

The respondent appeals the Immigration Judge's January 11, 2016, decision denying his request for (b) (6).¹ See section (b) (6) of the Immigration and Nationality Act, (b) (6). The respondent also challenges the procedural fairness of his hearing. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Mexico who has been in the United States since approximately 1999 (I.J. at 3; Exh. 1). The respondent conceded his removability below, but requested (b) (6) (I.J. at 2-3; Exh. 4). The respondent (b) (6) that he will be (b) (6) Mexico because he would (b) (6) the United States, may be (b) (6), and because his cousin (b) (6) (I.J. at 4-5; Tr. at 78, 80-85). The Immigration Judge denied the respondent's application for (b) (6), finding that he had not (b) (6) the United States and had not demonstrated (b) (6) (I.J. at 10-11). Alternatively, the Immigration Judge found that the respondent had not established (b) (6)

¹ The respondent does not meaningfully challenge the denial of his application for (b) (6) under the Immigration and Nationality Act, or request for (b) (6). See section (b) (6) of the Act, (b) (6). Accordingly, we deem any challenge to the denial of those forms of relief waived. *Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999).

(b) (6) because there was no indication that (b) (6) on (b) (6) (I.J. at 11-12).

The respondent raises two main arguments on appeal. First, he argues that the Immigration Judge erred in not allowing his attorney to ask him leading questions, as he suffered from a diminished mental competency (Resp. Br. at 10). The respondent also argues that the Immigration Judge erred in denying his (b) (6) application as (b) (6) (Resp. Br. at 10-14).

We disagree with the respondent that remand is warranted for reasons related to his mental capacity. First, the record does not establish that the respondent suffers from a diminished mental capacity. Though the respondent's counsel argued below that the respondent is "mentally slow," we agree with the Immigration Judge that the record contained no indicia of mental incompetence, such that would have warranted further inquiry into the respondent's ability to meaningfully participate in his removal proceedings (I.J. at 10). See *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). Indeed, throughout his early hearings, the respondent successfully requested numerous continuances and demonstrated an understanding of the nature and object of the removal proceedings (I.J. at 10; Tr. at 38-43). *Id.*

Furthermore, even if the respondent suffers from a diminished mental capacity, the Immigration Judge provided the procedural safeguards the respondent sought. Though the Immigration Judge initially indicated that she was not inclined to allow leading questions, she did allow several leading questions related directly to the respondent's claim for relief (Tr. at 80-82, 90-91). The respondent does not point to any portion of the hearing where he was not allowed to fully complete his testimony.

As to the respondent's challenge to the denial of his application for (b) (6), even assuming the Immigration Judge erred in denying the respondent's (b) (6) application as untimely, she properly found that the respondent had not established (b) (6) (I.J. at 12-13). See section (b) (6) of the Act. The respondent does not challenge this finding on appeal. Accordingly, we agree with the Immigration Judge that the respondent is not eligible for (b) (6).

We acknowledge the respondent's statements in the conclusion section of his brief that the Immigration Judge erred in (1) not fully considering the fact that the respondent could not have obtained lawful status under the Deferred Action for Childhood Arrivals ("DACA") program because he was not able to complete his GED; and (2) not allowing him to fully testify about his (b) (6) Mexico and being (b) (6) (Resp. Br. at 15). We are not obligated to address these arguments as they are not sufficiently raised on appeal. See *Matter of Gutierrez*, 19 I&N Dec. 562, 565 n.3 (BIA 1988) (declining to address argument raised by the Service in a footnote on appeal). However, we note that the respondent's request for DACA relief is a collateral matter to these proceedings, and was not properly before the Immigration Judge for consideration. See, e.g., *Matter of Quintero*, 18 I&N Dec. 348, 349-50 (BIA 1982). Additionally, as explained above, the respondent has not pointed to any specific instance in which the Immigration Judge limited his testimony; and we find no evidence of such an error in the record.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – San Francisco, CA

Date:

JUN 16 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Meeran Mahmud, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6); cancellation of
removal; voluntary departure

The respondent appeals the Immigration Judge's December 17, 2015, decision denying his applications for (b) (6) under sections (b) (6) of the Immigration and Nationality Act, (b) (6), and for (b) (6) (2016), and finding him ineligible for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), and voluntary departure. The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

Initially, we agree with the respondent's appellate contention that the Immigration Judge erred in finding him ineligible for cancellation of removal under section 240A(b) of the Act and voluntary departure due to his 2013 conviction (I.J. at 2). See Respondent's Brief at 23-25. Specifically, the Immigration Judge found that the respondent's 2013 "drug possession" conviction renders him ineligible for both forms of relief (I.J. at 2). Although there is some indication that the respondent's arrest leading up to his 2013 conviction was related to drugs, there are no conviction documents in the record, and the evidence that is in the record, specifically the Form I-213 and other testimonial evidence, indicates that the respondent's 2013 conviction was for the offense of disorderly conduct based on intoxication, not drug possession as found by the Immigration Judge (Exh. 2; I.J. at 2). Particularly in view of the respondent's pro se status at the time of the merits hearing, the foregoing circumstances required the Immigration Judge to further develop the record with regard to the respondent's criminal history. See, e.g., *Lacsina Pangilinan v. Holder*, 568 F.3d 708 (9th Cir. 2009); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002). Thus, we find that a remand is needed to reconsider the respondent's eligibility for cancellation of removal and voluntary departure (I.J. at 2).¹

¹ There is some indication that the respondent has suffered other convictions that may render him ineligible for the relief. However, the Immigration Judge rendered his decision on the basis
(continued...)

In addition, review of the record supports the respondent's contention that the Immigration Judge did not sufficiently consider whether he established (b) (6) his failure to (b) (6) application, given that his claim is predicated (b) (6) his brother in Mexico from 2013 through 2015 (Tr. at 66-68; Exh. 3; I.J. at 7-8). See Respondent's Brief at 6-11. In his decision, the Immigration Judge summarily concluded that the respondent had not shown (b) (6) application, but the respondent, appearing pro se, testified that he (b) (6) to Mexico based on his (b) (6) in Mexico and (b) (6) beginning in 2013 and extending through 2015, just before he filed his (b) (6) application (Tr. at 66-68). Further, the Immigration Judge incorrectly required the respondent to establish "by clear and convincing evidence" that (b) (6) applied, when such an exception's existence need only be demonstrated "to the satisfaction of the Attorney General," i.e., by a preponderance of the evidence. Section (b) (6) of the Act; see also (b) (6). Thus, we find that a remand is also warranted for the Immigration Judge to consider under the correct legal standard the question whether, on the basis set forth above, the respondent has shown (b) (6) file and whether he filed his application within a reasonable period after (b) (6), if necessary (I.J. at 8). See (b) (6) in the applicant's (b) (6) affect his eligibility for (b) (6).

We also find that the Immigration Judge's conclusion that the respondent did not meet his burden in establishing a sufficient nexus for his claim is insufficient (I.J. at 8-9). Thus, upon remand, the Immigration Judge should reconsider and provide a full analysis of whether the respondent's (b) (6) for purposes of (b) (6) (I.J. at 8-9).² See Respondent's Brief at 11-17. See also (b) (6) (9th Cir. 2015) (in case involving applicant (b) (6), court states that even under Board's refined framework, "the (b) (6) (b) (6) (citing (b) (6) (BIA 2014)). Upon remand, the Immigration Judge should also reconsider the respondent's application for (b) (6), if it becomes necessary (I.J. at 9-12). In his decision, the Immigration Judge cited to several excerpts from evidence in the record regarding (b) (6) in Mexico, but he did not relate those

(...continued)

of his misunderstanding that the respondent's 2013 conviction was for drug possession (I.J. at 2; Exh. 2).

² Even if the Immigration Judge again determines the respondent's (b) (6) application is (b) (6), the issue of whether he has shown a sufficient nexus is relevant to the issue of whether he is eligible for (b) (6) under the Act.

(b) (6)

excerpts to his summary conclusion that the respondent did not show that the Mexican (b) (6) (I.J. at 9-12).

Further, the respondent's claim for (b) (6). In (b) (6) (9th Cir. 2013), the United States Court of Appeals for the Ninth Circuit, where this case arises, remanded the record to the Board for, *inter alia*, further consideration of the denials of (b) (6). See *id.* Specifically, the Board had concluded that (b) (6), precluding the alien from obtaining relief on any basis. See *id.* The Ninth Circuit found the conclusion was the result of legal error because, in addressing (b) (6), the Board actually focused only on the (b) (6), and in addressing (b) (6), the Board did not adequately (b) (6). See *id.*

In its decision, the Ninth Circuit noted that significant evidence in the record called into doubt the (b) (6) in view of noted instances (b) (6). See *id.* The Court noted that the available country conditions evidence demonstrated that (b) (6). See *id.* Citing to one State Department report, the Court noted that, "as a result of (b) (6) in 2008." See *id.* (citing David T. Johnson, U.S. Dep't of State, Guns, Drugs and Violence: The Merida Initiative and the Challenge in Mexico (2009)). Citing additional evidence, the Court found, "notwithstanding the superior efforts of the (b) (6) at the state and local levels 'continue[s] to be a (b) (6)'" See *id.* (citing U.S. Dep't of State, 2008 (b) (6): Mexico (2009)). The Court further noted that "many (b) (6), which leads to the (b) (6)." *Id.* (internal citations omitted).

Because the Board had only considered (b) (6) as a whole would not, the Court remanded for consideration in the first instance of the petitioner's claims under the correct legal standards. See *id.* Here, the Immigration Judge may have relied on the evidence showing (b) (6) in Mexico and not the evidence regarding its actual ability to do so, nor the extent of (b) (6) (I.J. at 9-12). Therefore, upon remand the Immigration Judge should reconsider the respondent's applications in accordance with the Ninth Circuit's decision in (b) (6).

In sum, upon remand, the Immigration Judge should reconsider the respondent's eligibility for cancellation of removal and/or voluntary departure, whether his application for (b) (6) is (b) (6) or whether the respondent has established (b) (6) his (b) (6), whether the respondent has established a sufficient nexus for his claim for (b) (6) under the Act, and whether the respondent has otherwise met the requirements for (b) (6) under existing Ninth Circuit precedent.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Omaha, NE

Date:

FEB 10 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dan Vondra, Esquire

ON BEHALF OF DHS: Matthew E. Morrissey
Assistant Chief Counsel

APPLICATION: Termination; voluntary departure

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's decision dated November 4, 2014, denying her motion to suppress evidence and terminate the proceedings. The appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the Immigration Judge's denial of the respondent's motion to suppress evidence and his determination that the respondent is subject to removal as charged. We find nothing in the record to support the respondent's assertion that evidence of her alienage and illegal presence was obtained under egregious circumstances that justify suppression, and the respondent does not dispute the truth or accuracy of that information. *See INS v. Lopez-Mendoza*, 468 U.S. 1038, 1051, n.5. (1984) (observing that the exclusionary rule for evidence obtained in violation of the Fourth Amendment generally does not apply in deportation proceedings, and that to warrant the suppression of evidence, an alien must show that it was obtained under egregious circumstances which transgress notions of fundamental fairness or undermine the probative value of the evidence in question).

The record reflects that the respondent was taken into custody following a traffic stop by a local police officer after a check of her vehicle license plate confirmed that it was registered to an individual who was barred from driving and whose description corresponded to that of the respondent. The arrest resulted in the respondent's detention and subsequent questioning by an immigration officer, leading to the disclosure of the respondent's illegal presence in the United States. The respondent argues that the traffic stop was an egregious Fourth Amendment violation because it was based solely on racial profiling, and that evidence obtained as a consequence of the stop cannot be used to support the removal charge against her and must be suppressed. *See Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010) (a decision to arrest and detain an individual based on race could constitute an egregious constitutional violation).

We find no merit in the respondent's arguments. As noted by the Immigration Judge, the respondent has the initial burden of establishing a prima facie case that an egregious Fourth Amendment violation has occurred (I.J. at 6). See *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971). An alien seeking suppression must provide specific, detailed statements or other evidence based on personal knowledge, and such allegations cannot be general, conclusory, or based on representations made by counsel. See *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). Here, the respondent does not identify any speech or overt act to support the claim of racial profiling. She merely asserts that the arresting officer lacked probable cause to stop her vehicle, and therefore must have pulled her over based solely on her ethnic appearance. However, the arresting officer's affidavit reflects that he or she did have probable cause for arresting the respondent: a search of the respondent's license plate number revealed that her vehicle was registered to an individual who matched the respondent's description and was barred from driving as an habitual traffic offender. The respondent does not argue, and we think that no argument can be made, that the respondent had any reasonable expectation of privacy in her vehicle license plate number that was mounted for public viewing. Compare *York v. Class*, 475 U.S. 106 (1986) (no expectation of privacy in vehicle identification number that was open to public view); see also *United States v. Sparks*, 37 Fed. Appx. 826, 829 (8th Cir. 2002) (officer did not need reasonable suspicion to check defendant's license plate).

Furthermore, even if the license plate match did not constitute "probable cause" for the respondent's arrest, that arrest did not constitute an egregious violation warranting suppression of evidence in Immigration Court. See *Garcia-Torres v. Holder*, 660 F.3d 333, 336-37 (8th Cir. 2011) (arrest resulting from warrantless entry and search not egregious). The respondent's claims of a racial or ethnic motivation are, as noted, based on speculation. Furthermore, it is doubtful that even an egregious violation by local law enforcement officers could justify exclusion of evidence in federal immigration proceedings. See *Lopez-Gabriel v. Holder*, 653 F.3d 683, 686 (8th Cir. 2011).

The Immigration Judge correctly observed that even if the respondent had established an egregious Fourth Amendment violation warranting suppression of her admission of alienage in the wake of the traffic stop, independent evidence of alienage obtained from her immigration records after authorities learned her identity through a fingerprint match would not be suppressible (I.J. at 2). See *INS v. Lopez-Mendoza* at 1039 ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."). Once alienage was established, the burden shifted from the government to the respondent to establish that she is clearly and beyond doubt entitled to be admitted and is not inadmissible. See section 240(c)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(2)(A). The respondent does not claim that she is lawfully present in the United States pursuant to a prior admission or parole. Therefore, we find that the removal charge brought against her under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), was properly sustained.

Effective January 20, 2009, an Immigration Judge who grants an alien voluntary departure must advise the alien that proof of posting of a bond with the DHS must be submitted to the Board within 30 days of filing an appeal, and that the Board will not reinstate a period of

voluntary departure in its final order unless the alien has timely submitted sufficient proof that the required bond has been posted. 8 C.F.R. § 1240.26(c)(3). *See Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010). The Immigration Judge provided the respondent with the required advisals and granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a \$500 bond within five days. The record before the Board, however, does not reflect that the respondent submitted timely proof of having paid the bond. Therefore, the voluntary departure period will not be reinstated, and the respondent will be ordered removed from the United States to Mexico pursuant to the Immigration Judge's alternate order.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Buffalo, NY

Date: FEB 26 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

APPLICATION: Reopening

ORDER:

This matter was before the Board on October 8, 2015, when we dismissed the respondent's appeal of the Immigration Judge's decision denying his applications for (b) (6). The respondent filed the present motion to reopen proceedings on December 31, 2015, and filed supplemental materials that the Board received on January 6, 2016. The respondent seeks reopening to pursue adjustment of status on the basis of a Form I-130 visa petition filed on his behalf.

The Notice to Appear indicates that the respondent entered the United States without inspection. *See* Exh. 1. The Immigration Judge found that he entered at an unknown place and date using an alien smuggler. *See* I.J. at 1, 10-11. Accordingly, the respondent is not shown to be statutorily eligible for adjustment of status. *See* sections 245(a), (i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1255(a), (i); *see also* *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). The motion to reopen is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Honolulu, HI

Date:

FEB 26 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elena M. Kareneva-Simpson, Esquire

ON BEHALF OF DHS: Chandu Latey
Assistant Chief Counsel

APPLICATION: Reopening; stay of removal

ORDER:

On February 1, 2016, the respondent submitted a motion to reopen proceedings in which the Board dismissed his appeal on November 25, 2015. He also seeks a stay of removal. The Department of Homeland Security opposes the motion. The motion is denied.

The respondent seeks reopening in order to pursue an application for adjustment of status as he is the derivative beneficiary of a fourth preference visa petition filed on his wife's behalf by her United States citizen brother (Motion at 2-5, Tab B). This petition has a priority date of August 28, 1998. In this regard, he asserts that this priority date "is to be reached" as the current priority date for such visas is June 1, 1998 (Motion at 3, Tab C).

However, we find that the respondent has neither submitted new and material evidence, nor shown that he is prima facie eligible for the relief sought. *INS v. Abudu*, 485 U.S. 94 (1988); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); 8 C.F.R. § 1003.2(c)(1). The Board already considered the respondent's claim for adjustment based on the noted visa petition, and found that the visa's priority date was not current. To date, the priority date is still not current. DOS Visa Bulletin, Vol. IX, No. 89 (Feb. 2016). Moreover, the March Visa Bulletin reflects no movement in the June 1, 1998, date for Mexican fourth preference visas. DOS Visa Bulletin, Vol. IX, No. 90 (March 2016). As the respondent is not the beneficiary of a current visa petition, he has neither submitted new and material evidence, nor shown that he is prima facie eligible for adjustment. As such, reopening is not warranted. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c); 1245.2(a)(2). Accordingly, the motion is denied.


FOR THE BOARD

Falls Church, Virginia 22041

Files: (b) (6) – Detroit, MI
(b) (6)

Date:

JAN 14 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: George P. Mann, Esquire

ON BEHALF OF DHS: Rosario Shoudy
Assistant Chief Counsel

APPLICATION: Reconsideration; reopening

This case was before the Board on September 2, 2015, when we dismissed the respondents' appeal. The respondents filed a timely motion to reconsider the Board's decision on September 30, 2015. The respondents have now filed a timely motion to reopen proceedings, supported by additional evidence. The motion also reflects that the lead respondent has been granted Temporary Protected Status. The Department of Homeland Security filed an opposition to the motion to reconsider, but has not submitted a further response to the motion to reopen.

The last evidentiary hearing in this case was in August 2014. There does not appear to be any dispute that the respondents are Syrian (b) (6). Given the proffered evidence before us, the motion to reopen these proceedings will be granted. The record will be remanded to provide the parties the opportunity to present additional, more current evidence regarding the relevant country conditions for (b) (6) in Syria and for further consideration of the respondents' applications for relief from removal.

ORDER: The motion to reopen is granted and the record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion and the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Miami, FL

Date: JAN - 4 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mayra Joli, Esquire

APPLICATION: Reopening

The respondent is a native and citizen of El Salvador. On October 6, 2015, the Board dismissed the respondent's appeal. On November 9, 2015, the respondent filed a timely motion to reopen. Sections 240(c)(7)(A) and (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A) & (C)(i); 8 C.F.R. § 1003.2(c). For the following reasons, the motion is denied.

A motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material" and "must be accompanied by the appropriate application for relief and all supporting documentation." 8 C.F.R. § 1003.2(c)(1). A motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing" *Id.* The movant must also establish prima facie eligibility for the relief sought, *INS v. Doherty*, 502 U.S. 314, 319 (1992); *INS v. Abudu*, 485 U.S. 94, 104-05 (1988), and satisfy the "heavy burden" of establishing that if the proceedings were reopened, with all the attendant delays, the new evidence would likely change the result in the case. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

The respondent now seeks reopening so that the Immigration Judge may consider additional evidence in support of his claim for (b) (6). The respondent continues to claim that he (b) (6). Both the Immigration Judge and the Board denied relief on the basis that he did not demonstrate the requisite (b) (6). He has submitted additional evidence that his stepson and brother were (b) (6) (Motion to Reopen at 1). The evidence attached to the motion includes, inter alia, a statement from the respondent and (b) (6).

At the outset, the motion is denied as the respondent has not submitted a new (b) (6) application as required by the regulations. 8 C.F.R. § 1003.2(c). We decline to consider paragraphs one and two of the respondent's statement as these paragraphs describe events predating the Immigration Judge's hearing, and the respondent has not demonstrated why he did not present this detailed testimony to the Immigration Judge. Moreover, during his hearing, the respondent did not claim that (b) (6). Rather he testified that he did not know (b) (6) (Tr. at 37-56). The

(b) (6)

third paragraph of his statement does not (b) (6). As such, the additional evidence does not indicate that (b) (6).

Even if (b) (6), the respondent has not established that (b) (6) within the meaning of the Immigration and Nationality Act. See Section (b) (6) (BIA 2011) (an applicant must prove that (b) (6); (b) (6) (BIA 2010). "Evidence that either is consistent with (b) (6) or the petitioner's failure to cooperate with (b) (6), does not constitute evidence of (b) (6)." (b) (6) (11th Cir. 2013).

The evidence attached to the motion does not adequately demonstrate why the respondent's stepson and brother (b) (6), let alone that one (b) (6). Simply showing that (b) (6) is insufficient to meet his burden of proof as to nexus, or that he is eligible for relief. (b) (6). Rather, the additional evidence suggests that the respondent's (b) (6) (b) (6) (BIA 2007). The respondent's (b) (6), which is shared by all of El Salvadoran society, is insufficient to demonstrate prima facie eligibility for (b) (6). See (b) (6) (BIA 2014) ("A (b) (6) (b) (6), but not (b) (6) are bases for (b) (6)" (citations omitted).

Further, the additional evidence submitted is insufficient to demonstrate prima facie eligibility such that (b) (6) upon removal to El Salvador. (b) (6). Since the respondent has not met his heavy burden of demonstrating that the proceeding should be reopened, the following order shall be issued.

ORDER: The motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) [REDACTED] – San Antonio, TX

Date:

In re: (b) (6) [REDACTED]

APR - 7 2016

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

PPLICATION: Reopening; stay of removal

On November 20, 2013, the Board entered a final administrative order upholding an Immigration Judge's denial of (b) (6) [REDACTED].¹ The respondent has filed a timely motion to reopen her removal proceedings. The Department of Homeland Security has not responded to the motion, which will be denied.

The respondent urges that reopening is warranted based on ineffective assistance of former counsel, Paul A. Esquivel, who represented her before the Immigration Judge and, initially, on appeal before the Board. She alleges that Mr. Esquivel did not inform her until the day of her individual hearing that she would be applying for (b) (6) [REDACTED] and that his failure to prepare her to express her (b) (6) [REDACTED] Mexico, particularly as it relates to her (b) (6) [REDACTED], led to the denial of relief. She also claims that Mr. Esquivel's conduct prejudiced her on appeal before the Board. More generally, the respondent asserts that Mr. Esquivel's false promises regarding his ability to help her obtain lawful permanent resident status resulted in her being placed in removal proceedings and subject to an order of removal to Mexico. In support of her claim, the respondent has submitted an internet profile from the Texas Bar Association and news articles indicating that Mr. Esquivel resigned his law license in lieu of discipline (Resp. Motion at Tabs B & C).

To prevail on a claim of ineffective assistance of counsel for purposes of reopening, the respondent must demonstrate that she was substantially prejudiced by Mr. Esquivel's performance. See *Goonswan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001) (citation omitted). Proving prejudice requires that the respondent make a prima facie showing that, absent counsel's deficient performance, she would have been entitled to the relief she sought. See *Miranda-Lores v. INS*, 12 F.3d 84, 85 (5th Cir. 1994) (citation omitted). The fact of Mr. Esquivel's resignation of his law license does not, in and of itself, constitute ineffective assistance of counsel in this case such that the respondent suffered prejudice as a result of his representation.

¹ The Board also upheld the Immigration Judge's denial of cancellation of removal. However, the respondent has not indicated in her motion that she is seeking to reopen proceedings to pursue that benefit. Therefore, we deem that issue waived.

The instant motion fails to make a prima facie showing that the respondent is entitled to relief based on her (b) (6) if she returns to Mexico. First, the respondent is barred statutorily from (b) (6) because her (b) (6) application was (b) (6) and she did not demonstrate (b) (6) (I.J. at 2-3, dated Feb. 25, 2014; BIA at 1-2, dated Nov. 20, 2015). See section (b) (6) of the Immigration and Nationality Act, (b) (6). We note that the respondent did not retain Mr. Esquivel until (b) (6) 2012, which was well (b) (6) for seeking (b) (6) (Motion to Reopen at Exh. 1).

Second, the respondent has not submitted any evidence indicating that (b) (6) under the Act) or that there is a (b) (6) to the respondent. (b) (6) We acknowledge the respondent's (b) (6) in Mexico (b) (6) (see Resp. Motion at Tab A). However, a claim for (b) (6) must be objectively reasonable and supported by specific concrete evidence in the record. See (b) (6) (1987). The lack of specific and concrete evidence in support of her claim prevents the respondent from establishing a prima facie showing that, absent counsel's deficient performance, she would have been entitled to (b) (6).

Moreover, the respondent has not proffered any evidence with the instant motion that makes a prima facie showing that she (b) (6) upon her removal to Mexico. See generally (b) (6).

Finally, Mr. Esquivel's pre-immigration proceeding advisements regarding the respondent's eligibility for lawful permanent resident status does not constitute ineffective assistance of counsel. The respondent cannot show substantial prejudice from her placement in removal proceedings, inasmuch as she conceded at the hearing, and does not dispute on appeal, that she is removable as charged. See, e.g., *Lara-Torres v. Ashcroft*, 383 F.3d 968 (9th Cir. 2004) (persuasive authority finding that erroneous advice received outside and in advance of immigration proceedings did not affect fairness of proceedings and did not provide basis for reopening due to ineffective assistance of counsel).

In view of the foregoing, the respondent has failed to show that Mr. Esquivel's alleged misconduct resulted in substantial prejudice either before the Immigration Judge or the Board, such that reopening of these proceedings would be warranted. Finally, we do not find exceptional circumstances that would warrant reopening pursuant to our own discretionary sua sponte authority under 8 C.F.R. § 1003.2(a). See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).² Accordingly, the following orders will be entered.

² The respondent is not precluded from seeking the favorable exercise of prosecutorial discretion directly from the DHS.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The request for a stay of removal is denied as moot.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - El Centro, CA

Date: APR 20 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: John D. Holliday
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: Reopening

The respondent, a native and citizen of Nigeria, has filed a timely motion to reopen his proceedings. This matter was last before the Board on November 10, 2015, when we dismissed the respondent's appeal from the Immigration Judge's decision denying his applications for (b) (6).

The Department of Homeland Security has filed an opposition to the motion and the respondent has filed a reply and an additional motion to supplement the record. The motion to reopen will be granted.

A motion to reopen must state the new facts to be considered at the reopened hearing and be supported by evidence that is material, that was previously unavailable, and that demonstrates prima facie eligibility for the relief sought. See 8 C.F.R. § 1003.2(c); see also *INS v. Abudu*, 485 U.S. 94 (1988). An alien who seeks to reopen proceedings to pursue relief bears the heavy burden of showing that if proceedings were reopened, the new evidence offered would likely change the result in the case. See *Shin v. Mukasey*, 547 F.3d 1019 (9th Cir. 2008); *Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1992). Under precedent in the United States Court of Appeals for the Ninth Circuit, when deciding whether to grant a motion to reopen, the affidavits and evidence presented with a motion must be taken as true unless inherently unbelievable. See *Yan Rong Zhao v. Holder*, 728 F.3d 1144 (9th Cir. 2013); *Maly v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991).

With his motion, the respondent has submitted various documents, including a letter from a friend in Nigeria discussing (b) (6) 2015 for (b) (6) respondent's family, an affidavit from a police officer and friend, an affidavit from a friend in the United States, a letter from the church that is currently caring for the respondent's mother in Nigeria, a declaration from the respondent's (b) (6) friend's mother, a (b) (6) (b) (6), 2014, a copy of his friend's (b) (6), a (b) (6) for the respondent's

mother dated (b) (6) 2013, a letter from a friend of the respondent's, an "oath declaration" from the respondent's brother dated (b) (6), 2014, a letter from the respondent's mother, and (b) (6) information regarding the (b) (6) in Nigeria. Some of the evidence presented predates the respondent's hearing, but he claims that he was unable to obtain such evidence because he was detained, did not have legal counsel, and did not have enough time. Some of the respondent's evidence relates to (b) (6) and family members after his merits hearing.

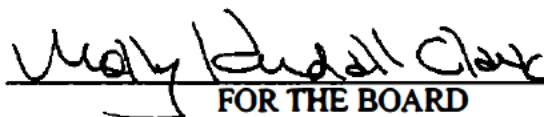
Under the circumstances presented here, taking the respondent's evidence as true, as instructed by binding case law, and considering the (b) (6) evidence of the (b) (6) in Nigeria, we conclude that the respondent has met the requirements of a motion to reopen. See *Ordonez v. INS*, 345 F.3d 777, 785-86 (9th Cir.2003) (petitioner need not demonstrate conclusively his eligibility for relief in order to prevail in a motion to reopen).

We recognize that the respondent was previously found to be not credible by the Immigration Judge and the Board found that the Immigration Judge's adverse credibility finding was not clearly erroneous. At the remanded proceedings, the Immigration Judge should make factual findings, including assessing the additional evidence and any additional testimony for credibility. In granting the motion to reopen, we express no opinion about the ultimate merits of the respondent's claim.

Accordingly, the motion will be granted and the record remanded.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded for further proceedings and the entry of a new decision consistent with the foregoing order.


FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUN 15 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

APPLICATION: (b) (6)

The respondent has appealed an Immigration Judge's decision dated January 27, 2016, finding the respondent mentally competent and denying the respondent's applications for (b) (6) and (b) (6) under sections (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6) and (b) (6). The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Department of Homeland Security ("DHS") filed a "Notice of *Franco-Gonzalez* Class Membership and Request for Competency Inquiry" [*Franco* Notice] with the Immigration Judge, along with the respondent's medical and mental health records which reflects that the respondent suffers from depression, and that she is taking medication and being treated by a psychiatrist (Exhs. C-1 and C-3; Tr. at 42-43). This notice entitles the respondent to certain procedural protections, as set forth in *Franco-Gonzalez v. Holder*, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) ("Franco Implementation Order"), the order further implementing the permanent injunction in *Franco-Gonzalez v. Holder*, 2013 WL 8115423 (C.D. Cal. 2013). The respondent also submitted evidence that she attended special education classes in school (Exh. C-4).

The Immigration Judge found a bona fide doubt as to the respondent's competency. In compliance with the Franco Implementation Order, he held a Judicial Competency Inquiry to determine if the respondent is competent to represent herself (Tr. at 44, 46-67). At the conclusion of the Judicial Competency Inquiry, the Immigration Judge found that the evidence

was insufficient to determine whether the respondent was mentally competent, and he ordered a Forensic Competency Evaluation, pursuant to the directives in the Franco Implementation Order (I.J. at 7-8; Tr. at 67-68).

According to the Forensic Competency Evaluation, the respondent was oriented to all spheres, her speech was coherent, her thought process was logical and void of any delusions, and no sensory perceptual disturbances were reported or observed. Moreover, her memory appeared intact, she had no problems with attention or concentration, her abstraction ability was concrete, and her judgment, insight and impulse control were considered fair (Exh. C-5 at 4).

The psychiatrist diagnosed the respondent with a Specific Learning Disability, with impairment in reading and in written expression (Exh. C-5 at 5). However, she found that the respondent's reported symptoms of depression "did not rise to the level of a clinical condition that would warrant a diagnosis of a major mood disorder" (*Id.*; I.J. at 8).

The psychiatrist addressed all of the components of the pro se competency standard set forth in the Franco Implementation Order. She concluded that the respondent demonstrated a rational and factual understanding of the nature and object of the proceedings, was able to discuss the charges and possible outcomes, and understood the role of the participants (Exh. C-5 at 5). The psychiatrist also concluded that the respondent understands her rights in proceedings, and is able to exercise these rights, make informed decisions about whether to waive such rights, respond to the allegations and charges, present information and evidence relevant to eligibility for relief, and act upon instructions and information presented by the Immigration Judge and opposing counsel. *Id.* at 6; section III.A. of the Franco Implementation Order. In sum, the psychiatrist concluded that the respondent is competent to represent herself in immigration proceedings. *Id.*

Based on the Forensic Competency Evaluation, as well as the medical and school records and the evidence developed during the Judicial Competency Inquiry, the Immigration Judge found no reasonable cause to believe that the respondent is incompetent to perform the functions necessary to represent herself in proceedings (I.J. at 8-9). This finding is not clearly erroneous. *See Matter of J-S-S-*, 26 I&N Dec. 679, 684 (BIA 2015) (competency is a finding of fact that the Board reviews for clear error).

On appeal, the respondent asserts that she suffers from an "untreated seizure disorder" which also affects her competence. However, the psychiatrist considered this factor in the Forensic Competency Evaluation, noting that the respondent's school records reflect that she was on a medication for a seizure disorder but that the medication was eventually discontinued (Exh. C-5 at 3). The respondent also argues that the degree of her disabilities is unknown and that further professional assessment is required. However, the evidence of record is sufficient to support the Immigration Judge's finding of mental competency.

Turning to the respondent's applications for relief, we uphold the Immigration Judge's denial of the respondent's (b) (6) application as untimely (I.J. at 15-17). We agree with the Immigration Judge that the respondent's lack of knowledge of the availability of (b) (6) does not constitute either (b) (6) relating to the (b) (6) which materially affect the respondent's eligibility for (b) (6). *See* section (b) (6) of the

(b) (6)

Act; (b) (6). Moreover, we agree with the Immigration Judge that although (b) (6) application, the respondent has not established that her learning disability (b) (6) nor does she make such an assertion (I.J. at 17). (b) (6) Thus, the respondent is not eligible for (b) (6). She does not challenge this determination on appeal.

We also uphold the denial of the respondent's application for (b) (6). The respondent testified that when she was a child, she was (b) (6). There is no dispute that the (b) (6). However, it was (b) (6), and the respondent has not demonstrated that (b) (6) (I.J. at 18-19; Exh. 3 at 27). See (b) (6) (9th Cir. 2015) (holding that (b) (6), given the lack of evidence that Mexico (b) (6), or that Mexican (b) (6); see also (b) (6) (9th Cir. 2011) (b) (6) where there was insufficient evidence in the record that (b) (6). Nor has the respondent shown how these (b) (6).

The respondent has also not demonstrated (b) (6) her return to Mexico. We agree with the Immigration Judge that the respondent has not established that (b) (6) (I.J. at 19). See (b) (6). Although she also (b) (6) does not support a grant of (b) (6) (I.J. at 20). See (b) (6) (9th Cir. 2010) ("An alien's desire to be (b) (6) by (b) (6).").

The respondent's application for (b) (6) was also properly denied, as the respondent has not shown that (b) (6) in Mexico (I.J. at 21-22). (b) (6) (9th Cir. 2010); (b) (6). She has not established that (b) (6) in Mexico, she has not demonstrated that (b) (6). (b) (6) (9th Cir. 2006).

On appeal, the respondent argues that the Immigration Judge failed to consider her equities in the exercise of discretion. However, (b) (6) are not discretionary forms of relief. See (b) (6) (BIA 2009). She also

asserts that she has filed a request with the state court to have her felony conviction for Corporal Injury on a Child reduced to a misdemeanor under California Proposition 47. *See* California Penal Code § 1170.18 (codifying Proposition 47); *see also* *People v. Rivera*, 233 Cal.App.4th 1085, 183 Cal.Rptr.3d 362, 363 (Ct.App. 2015). However, the respondent has not submitted any evidence to support this claim, and the availability of post-conviction motions or other forms of collateral attack does not affect the finality of a conviction for immigration purposes, unless and until the conviction has been overturned. *Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996). Moreover, even if her conviction was reduced to a misdemeanor, it would not affect her removability under section 212(a)(6)(A)(i) of the Act for being present without being admitted or paroled, nor would it affect the denial of her applications for relief, which was not based on the respondent's criminal conviction.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date:

MAR 22 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: A. Sam Akintimoye, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Remand

In a decision dated April 23, 2015, the Immigration Judge found the respondent removable as charged, and, in lieu of removal to Mexico, granted him the privilege of voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The respondent now appeals from that decision. He also moves the Board to remand the record to the Immigration Judge to enable him to apply for (b) (6). See 8 C.F.R. §§ 1003.2(c)(1), (4). The appeal will be dismissed.¹ The motion will be denied.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. See 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

On appeal, the respondent argues that he was unaware that he could have applied for (b) (6) and related relief at the removal hearing because the Immigration Judge did not ask him whether he or anyone in his family (b) (6). See Motion Exhibit A. He further asserts that if the Immigration Judge had so inquired, he would have told the Immigration Judge about (b) (6) in Mexico (b) (6). *Id.*

The Immigration Judge noted that the respondent was questioned (b) (6) to Mexico, and that the respondent stated that he (b) (6) that he could (b) (6). See Immigration Judge's Decision at 2, 3-4. These findings of fact are not clearly erroneous. See Transcript of the Proceeding at 20-21. Although the respondent answered

¹ The respondent's request for review by a panel of three Board Members is denied. See 8 C.F.R. § 1003.1(e)(6).

(b) (6)

in the affirmative when asked if he (b) (6) to Mexico, he also stated: "I am not (b) (6). It is (b) (6) in Mexico is (b) (6) *Id.*, at 20-21. We also note that the Immigration Judge properly advised the respondent that he could file (b) (6), and made available the (b) (6) (b) (6) in compliance with the regulation at (b) (6). *See also* Transcript of the Proceedings at 20-22. On review, we find that the respondent's hearing was conducted fairly and that there was no denial of due process. *See Matter of Exame*, 18 I&N Dec. 303 (BIA 1982).

To the extent that the respondent seeks remand for (b) (6) and related relief, the motion to remand will be denied. *See* 8 C.F.R. §§ 1003.2(c)(1), (4). The respondent has offered a (b) (6) application and supporting documentation. In an affidavit dated July 24, 2015, offered in support of the application, the respondent states that (b) (6) his sister in Mexico (b) (6), and that relatives in Mexico recently informed him that, "as a Mexican (b) (6), Respondent will be (b) (6) and (b) (6) in Mexico." *See* Motion Exhibit A.

As background information of conditions in Mexico, the respondent has offered an entry from the online encyclopedia, Wikipedia, describing (b) (6). *See* Motion Exhibit C. This Board, however, has found that Wikipedia entries lack indicia of reliability and warrant very limited probative weight in immigration proceedings. *See Matter of L-A-C-*, 26 I&N Dec. 516, 526-27 (BIA 2015). In any event, the Wikipedia entry does not corroborate the respondent's claims that (b) (6), and that (b) (6) with (b) (6).

Nor does the respondent's motion *prima facie* show that his sister (b) (6). *See* (b) (6) (BIA 2010) ("(b) (6) applicant must 'establish (b) (6) was or will be at least (b) (6)"); section (b) (6) of the Act, (b) (6). Remand is not warranted based on the evidence presented. *See generally Matter of Coelho*, 20 I&N Dec. 464, 472-72 (BIA 1992) (explaining that a party who seeks a remand or reopening of proceedings to pursue relief bears a "heavy burden" of proving that if proceedings before the Immigration Judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case).

The Immigration Judge granted the respondent voluntary departure, with safeguards, until May 27, 2015, conditioned upon the posting of a \$500 bond. Pursuant to 8 C.F.R. § 1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient proof that the required voluntary departure bond was posted with the Department of Homeland Security. If the alien does not provide such timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order. *Id.* The record shows the Immigration Judge gave the required warnings. *See* Transcript of the

Proceedings at 31-32. As the respondent has not submitted evidence to this Board of the payment of the bond, the voluntary departure period will not be reinstated, and the respondent shall be removed from the United States to Mexico pursuant to the Immigration Judge's alternate order.

The following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FURTHER ORDER: The respondent is ordered removed from the United States to Mexico pursuant to the Immigration Judge alternate order of removal.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Los Angeles, CA

Date:

JUL - 1 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Margaret W. Wong, Esquire

APPLICATION: (b) (6)

The respondent appeals from the decision of the Immigration Judge dated February 2, 2016, denying the respondent's applications for (b) (6). Sections (b) (6) of the Immigration and Nationality Act ("Act"), (b) (6). The Department of Homeland Security ("DHS") did not file a response to the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of the People's Republic of China ("China"). The respondent said he (b) (6) in 2010, while studying abroad, and later that year returned to China and (b) (6) (I.J. at 3-4). He did not have (b) (6) until (b) (6) 2013, when (b) (6) (I.J. at 5; Tr. at 45-50). The respondent was admitted to the United States at Honolulu, Hawaii, on March 13, 2013 (Exh. 1; Tr. at 43-48).

In April 2013, the respondent filed (b) (6) application (Exh. 8). He subsequently withdrew the application, electing to seek adjustment of status based on a visa petition filed on his behalf by his United States citizen spouse. In January 2015, the visa petition was denied. In (b) (6) 2015, he divorced his United States citizen spouse. In June 2015, the DHS detained the respondent and placed him in removal proceedings pursuant to a Notice to Appear issued in July 2015. The respondent filed second application for (b) (6) on August 5, 2015 (Exh. 2).

The Immigration Judge denied the respondent's applications for (b) (6). The Immigration Judge determined that the respondent was not a credible witness, did not provide sufficient corroboration of his claims, his (b) (6) application is barred as (b) (6), there are serious reasons to believe that he committed as serious non-political crime barring him from (b) (6), and he did not meet his burden of proof to establish eligibility for (b) (6).

(b) (6) (I.J. at 13-20, 27-28). The Immigration Judge also concluded that even assuming credibility, the respondent did not meet his burden of proof to establish (b) (6) or that he has (b) (6) by the Act (I.J. at 21-26).

On appeal, the respondent argues that the Immigration Judge's adverse credibility finding is clearly erroneous and that he erred by requesting additional corroboration (Resp. Br. at 19-26). He contends that his testimony was credible and consistent regarding (b) (6) (Resp. Br. at 20-21). The respondent argues that the Immigration erred by concluding that the respondent had engaged in illegal private fundraising, claimed that the Chinese government wrongly accused him of committing financial crimes, and asserts that the Chinese government approved and requested that his company set up escrow accounts to attract private investment for public projects (Resp. Br. at 21-24, 26-29).

The Immigration Judge gave specific and cogent reasons to support the adverse credibility finding, including inconsistencies between the respondent's written applications for (b) (6) the respondent's testimony, and documentary submissions. See section (b) (6) of the Act; (b) (6) (9th Cir. 2010); (b) (6) (BIA 2007). We conclude that the Immigration Judge's adverse credibility finding is not clearly erroneous. See sections (b) (6) of the Act; (b) (6).

For example, the Immigration Judge found that respondent's claim that his property funds management business in China was "raising money legally and that the local government used his company as a platform to gather funds for infrastructure projects" is not plausible in light of the record evidence indicating that he committed financial crimes, namely illegal fundraising and absorption of public funds (I.J. at 13-14; Tr. at 73-93; Exh. 7). The respondent testified that his business activities in China were legal and he had the consent of the local and national government banking officials (Tr. at 78-93). However, on (b) (6), 2013, the Public Security Bureau of (b) (6) issued an arrest warrant charging the respondent for the illegal collection of public deposits and false declaration of registered capital (Exh. 7). In (b) (6) 2013, the Red Notice published by Interpol indicates that China is seeking the arrest and possible extradition of the respondent for prosecution for his illegal business activities that included "collaboration with others, under the pretense of using high interest as bait, thus absorbed public fund[s] up to 60 million RMB (around 10 million U.S. dollars)" (Exh. 7).

We agree with the Immigration Judge that the respondent's claim that the Chinese government approved of his business practices is implausible and lacks veracity, given the derogatory information concerning his business activities and other evidence in the record (I.J. at 13-14). There are clear parallels between the business practices that the respondent testified that he engaged in and the private funding schemes that are illegal in China (Exh. 10 tab B at 5). The respondent testified that he set up escrow accounts to raise money for infrastructure projects that local governments needed and that all of the investors got paid (Tr. at 89-93). The Chinese Banking Regulatory Commission officials have been combating illegal private funding accomplished by setting up legal companies to promote fictitious projects

relating to countryside construction and promising exaggerated interest income (I.J. at 13; Tr. at 78-93; Exh. 7). The Red Notice issued by INTERPOL states that the respondent is a fugitive wanted for prosecution for financial crime of using the promise of high interest as bait for private investors (I.J. at 13; Tr. at 93-108). The respondent testified that his business activities were legal because the Chinese government controlled and approved all of his fundraising activities. The respondent also claimed that his business activities were a model and innovative enterprise for financing by the local governments (I.J. at 14; Exh. 2). The respondent's claims conflict with the record evidence as a whole.

For the reasons stated by the Immigration Judge, we agree that the respondent's "insistence that his activities were legal and endorsed by the government" is unpersuasive based on the totality of the evidence in the record (I.J. at 14). The evidence shows that a warrant was issued for the respondent's arrest only 1 month after he departed China and that he is a fugitive wanted for prosecution for financial crimes by the Chinese government since (b) (6) 2013 (I.J. at 14; Exh. 7). The respondent's original (b) (6) application omits mention of his business activities and problems associated with it (Exh. 8). The respondent claimed that he was not aware of the warrant for his arrest of the INTERPOL Red Notice until he was detained by Department of Homeland Security (DHS) in (b) (6) 2015 (Tr. at 121). However, the plausibility of his claim is undermined by his testimony that his friend, (b) (6), told him in (b) (6) 2013, that the authorities were investigating his company for possible illegal activities and his mother who did not know or inform him about the arrest warrant issued against him (I.J. at 14; Tr. at 97-98, 124-130). The General Manager and Chief Executive Officer for sales of his business were convicted of a crime and sentenced in (b) (6) of 2013¹ (Tr. at 101-09). Moreover, the respondent conceded that the financing activities that he engaged in were outlawed in (b) (6) 2013 by President Xi, after the 18th National Conference of the Chinese Communist Party and his company continued operating until (b) (6) 2013 (I.J. at 14; Tr. at 94-95; Exhs. 2, 7). The news articles in evidence describe illegal transactions in the "shadow banking sector" in China in the same manner that the respondent described how his company functioned as a "shadow bank" of the local government to raise funds from private investors (Exh. 10; Tr. at 139-141). The record shows that the Chinese government has been actively combating illegal fundraising since 2005 (Exh. 10).

The respondent alleges that he did nothing illegal and that arrest warrant and INTERPOL Red Notice are only evidence of false prosecution (Resp. Br. at 21-24, 26-29; Exh. 6). He contends that the (b) (6)

(I.J. at 8-10, 14; Tr. at 97-98, 100-108, 124-131). The

¹ The respondent testified that the General Manager and the Chief Executive Officer of sales of his company were convicted for helping a fugitive by not informing the authorities that he was departing China (Tr. at 155). Because the respondent departed China before the arrest warrant and INTERPOL Red Notice were issued, his testimony is not plausible or believable (Exh. 7).

Immigration Judge reasonably concluded that the respondent's shifting explanations for why China (b) (6) are not persuasive and together are inherently implausible (I.J. at 14-15; Tr. at 95-100, 127). See *Yan Liu v. Holder*, 640 F.3d 918, 926 (9th Cir. 2011) (improbable or inadequate explanations further undermined the alien's credibility). Despite the respondent's assertions on appeal (Resp. Br. at 20-24), the Immigration Judge's finding not to credit the respondent's explanations for the inconsistencies and implausible claims were a permissible view of the evidence and not clearly erroneous (I.J. at 13-15). See *Blanco v. Mukasey*, 518 F.3d 714, 721 (9th Cir. 2008); *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011).

The credibility finding is supported by the cumulative effect of the inconsistencies and shortcomings in the record. See, e.g., *Rivera v. Mukasey*, 508 F.3d 1271, 1275 (9th Cir. 2007) (finding that the cumulative effect of an alien's inconsistencies deprived the alien's claim of the requisite "ring of truth"). The Immigration Judge reasonably concluded that the respondent's explanations were not persuasive (I.J. at 14-15; see also Tr. at 97-98, 102-08, 154-166). See *Yan Liu v. Holder*, *supra*. Additionally, the Immigration Judge drew reasonable inferences with regard to credibility. See *Matter of D-R-*, *supra* (an Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept a respondent's account where other plausible views of the evidence are supported by the record). We concur with the Immigration Judge that the respondent's incredible testimony about (b) (6) undermines his entire claim for (b) (6). See section (b) (6) of the Act; see also *Li v. Holder*, 738 F.3d 1160 (9th Cir. 2013) (adverse credibility finding may relate to the entire claim).

If it were necessary to consider corroboration, we would affirm the Immigration Judge's determination that the respondent failed to sufficiently corroborate his testimony with reasonably available documents, particularly his company's contracts with the local government and banks that allegedly supported his claims as to his relationship with them (I.J. at 15-16). The respondent concedes that the Immigration Judge asked him whether he had written evidence of the contracts he entered into with the local government and banks and why he did not provide these documents (Resp. Br. at 23-24; Tr. at 145-146). The respondent claimed that he did not obtain the company's contracts with the local government and banks because he left China in a hurry (Tr. at 146). We agree with the Immigration Judge that the respondent's explanation is not persuasive (I.J. at 15-16). Moreover, the respondent expressly declined to submit additional evidence when the Immigration Judge gave him an opportunity to do so (Tr. at 194).² See *Ren v. Holder*, 648 F.3d 1079, 1094 (9th Cir. 2011).

² To the extent the respondent argues that he was not provided a sufficient notice of his need to corroborate his claim with certain pieces of evidence, we note that the Immigration Judge was not required to provide him with notice and an opportunity to provide any specific piece of corroborating evidence, as the respondent was not found credible (Resp. Br. at 24; I.J. at 14-15). Under the Act and the case cited by the respondent, the procedure is required only "[w]here the trier of fact determines that the applicant should provide evidence that corroborates *otherwise credible testimony*." Section (b) (6) of the Act (emphasis added); see also (b) (6) (continued...)

(b) (6)

In the absence of credible testimony, the respondent cannot establish his eligibility for (b) (6). See (b) (6) (BIA 1995) (a (b) (6) claim that lacks veracity cannot satisfy burdens of proof necessary to establish eligibility for (b) (6); (b) (6) (9th Cir. 2008). Likewise, the respondent did not establish his claim based on evidence or testimony independent of his own non-credible testimony. See *Matter of M-S-*, *supra*. In light of the foregoing, we decline to address the respondent's arguments on appeal that he otherwise established his eligibility for (b) (6) (Resp. Br. at 16-18, 26-36).

The respondent's claim for (b) (6) is based on the same facts deemed not credible. The respondent submitted documentary evidence indicating that (b) (6) is common in China (Exhs. 6; 9). However, the respondent did not show that he (b) (6) or that he (b) (6) in China. The documentary evidence does not independently establish that he (b) (6) to China (I.J. at 27). See (b) (6). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

(...continued)

(b) (6) (9th Cir. Nov. 16, 2015); (b) (6) (BIA 2015).

Falls Church, Virginia 22041

File: (b) (6) – Dallas, TX

Date:

JAN 19 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Paul Steven Zoltan, Esquire

CHARGE:

Notice: 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled (conceded)

APPLICATION: Continuance; remand

The respondent, a native and citizen of Honduras, appeals from the Immigration Judge's decision dated February 3, 2015, ordering him removed from the United States. The Department of Homeland Security (DHS) has not responded to the appeal. The respondent has also filed a motion to remand. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent first appeared before the Immigration Judge on December 18, 2014, on a juvenile calendar, accompanied by his mother (I.J. at 1; Tr. at 47-50). On that date, the Immigration Judge granted the respondent a 2-month continuance and recommended that he retain counsel (I.J. at 1-2; Tr. at 47-50). At the following hearing on February 3, 2015, the respondent indicated through counsel that his family law attorney intended to file a petition in state court within a week and requested a continuance for this purpose (I.J. at 2; Tr. at 53).¹ The Immigration Judge denied the request, concluding that the respondent had not established good cause because the state court petition had not been filed (I.J. at 2-3; Tr. at 53). The Immigration Judge then ordered the respondent removed to Honduras (I.J. at 3).

On appeal, the respondent has submitted evidence showing that a "Petition in Suit Affecting Parent-Child Relationship" was filed on his behalf in state court on February 11, 2015 (Resp. Motion to Remand at Tab A). He contends that if the state court petition is granted, he intends to

¹ According to the Notice to Appear, the respondent was born on (b) (6), 1997, such that he was (b) (6) years old when he appeared before the Immigration Judge (Tr. at 47; Exh. 1).

file an application for (b) (6) with United States Citizenship and Immigration Services (USCIS). The respondent requests that the case be remanded based on this proffered evidence.

Considering the new evidence of the state court petition filing, we will remand these proceedings to allow the respondent to request a continuance or administrative closure while the state court process occurs and his potential (b) (6) application is pending. See *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) ("As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time.") (internal citation omitted); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (discussing the standards for administratively closing proceedings); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (setting forth a framework to analyze whether good cause exists to continue proceedings to await adjudication by USCIS of a pending family-based visa petition).

When considering whether good cause exists to continue a matter, we may also consider the DHS's position, the reason for the continuance, and other procedural concerns. See *Matter of Hashmi*, *supra*. The Immigration Judge did not identify or rely on the DHS's position, the procedural history, or the respondent's potential eligibility for relief in declining to continue the matter (I.J. at 2-3). Absent compelling reasons, an Immigration Judge should continue proceedings to await adjudication of a pending state dependency petition in cases such as the one before us.²

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and the entry of a new decision.



FOR THE BOARD

² We separately note that guidance provided to Immigration Judges by the Chief Immigration Judge states that if (b) (6), "the case must be administratively closed or reset for that process to occur in state or juvenile court." See Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges (Sept. 10, 2014) (b) (6)

(b) (6) to Detention Cases in Light of the New Priorities).

Falls Church, Virginia 22041

File: (b) (6) – Eloy, AZ

Date:

OCT 29 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Marina N. Alexandrovich, Esquire

APPLICATION: Reopening

This matter was last before the Board on April 30, 2015, at which time we dismissed the respondent's appeal. On July 29, 2015, the respondent filed a timely motion to reopen these proceedings and to remand for further consideration of his application for voluntary departure in light of new evidence that his 2013 conviction has been reduced to a misdemeanor by the state court. The Department of Homeland Security has not responded to the motion. The motion will be granted, and the record will be remanded.

The respondent's 2013 conviction for criminal possession of a forgery device under Arizona Revised Statutes § 13-2003(A)(1), a class 6 felony for which he was sentenced to 1 year of unsupervised probation (Exh. 2), was found to be a crime involving moral turpitude. The Immigration Judge thus found that the respondent was statutorily ineligible for post-conclusion voluntary departure under section 240B(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b)(1)(B), because he could not demonstrate the requisite good moral character under section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3).

The respondent has presented new evidence showing that, subsequent to the Immigration Judge's decision, the state court designated his offense as a class 1 misdemeanor and discharged him from probation (*Motion to Reopen*, tab E). He urges that, as a misdemeanor offense for which the maximum possible sentence was 6 months' imprisonment, the conviction falls within the petty offense exception, and that he may now establish his statutory eligibility for voluntary departure. We agree. An alien who has been convicted of a crime involving moral turpitude committed during the relevant 5-year period cannot be found to have good moral character unless the conviction falls within the petty offense exception. Sections 212(a)(2)(A)(i)(I) and (ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), (ii)(II); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); *Lafarga v. INS*, 170 F.3d 1213 (9th Cir. 1999). The relevant sections of the Arizona law provide that a non-dangerous class 6 felony, such as the respondent's offense, may be deemed a class 1 misdemeanor upon certain conditions (which appear to have been met in this case), and that a class 1 misdemeanor is punishable by a maximum penalty of 6 months' imprisonment. Ariz. Rev. Stat. §§ 13-604, 13-707. Thus, the new evidence demonstrates that the respondent is not precluded from establishing his good moral character so as to qualify for voluntary departure. A remand is therefore warranted to allow him to pursue this relief, at which time all of his equities, including the birth of a new child, may be considered.

With his motion, the respondent has also presented additional evidence of his medical condition of diabetes, and requests the opportunity to revisit his prior applications for (b) (6)

However, the respondent's claims regarding his medical condition and its impact on those applications were fully considered both by the Immigration Judge and the Board. Thus, we do not find that the more recent medical evidence warrants renewed consideration of his applications for (b) (6). However, to the extent his medical condition may be relevant to a decision whether to grant voluntary departure, the Immigration Judge may consider this and any other evidence presented on remand. Accordingly, the following order will be entered.

ORDER: The motion to reopen is granted, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) Eloy, AZ

Date:

JUN 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin H. Harville, Esquire

ON BEHALF OF DHS: Danielle Sigmund
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: (b) (6)

The respondent appeals from the Immigration Judge's October 15, 2015, decision denying his applications for (b) (6).¹ Sections (b) (6) of the Immigration and Nationality Act, (b) (6). We will dismiss the appeal.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge correctly denied the respondent's application for (b) (6) because even assuming the (b) (6) under the Act, the respondent has not demonstrated the (b) (6) (I.J. at 10-11). Sections (b) (6) (a) (b) (6) the applicant"); see also (b) (6)

¹ On December 9, 2015, the respondent moved to withdraw his appeal, which the Board granted on December 11, 2015. On December 23, 2015, the respondent moved to reinstate his appeal, which the Board granted on March 17, 2016.

(b) (6)

(b) (6) (BIA 2011) ("A (b) (6) is a finding of fact to be determined by the Immigration Judge and reviewed by [the Board] for clear error").

The record reflects that the respondent was (b) (6) in Honduras because he (b) (6) (I.J. at 10; Tr. at 89-93). (b) (6) (9th Cir. 2011) ("a (b) (6) is not, standing alone, (b) (6)").

Further, although the (b) (6) the respondent, and (b) (6), the record supports the Immigration Judge's finding that the (b) (6), were (b) (6) and made because the respondent had (b) (6) (I.J. at 10-11; Tr. at 92-93). *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) ("An Immigration Judge is not required to accept a respondent's assertions, even if plausible, where there are other permissible views of the evidence based on the record."). Until the respondent was (b) (6), despite the fact that he lived openly in Honduras, commuted to his job and soccer games, and socialized with many people in his town (Tr. at 79-81, 84-85, 88-89). Further, there is no evidence that (b) (6), who are also (b) (6) in Honduras are (b) (6) (I.J. at 11; Tr. at 116-18, 122).² Moreover, there is no evidence that (b) (6) in Honduras, (b) (6) the respondent, (b) (6).

Thus, the Immigration Judge correctly found that the respondent has not established (b) (6), and he correctly denied the respondent's (b) (6) application on that ground (I.J. at 10-11). The respondent's (b) (6) in Honduras is insufficient to establish eligibility for (b) (6). *Singh v. (b) (6)* (9th Cir. 1998) ("[m]ere (b) (6) to the respondent is insufficient to establish eligibility for (b) (6)").

The respondent has also not met his burden of demonstrating that he cannot reasonably (b) (6) him (I.J. at 12-13). (b) (6) The record reflects that there are (b) (6) in Honduras, along the coast and in the capital city of (b) (6), and there is no evidence that (b) (6) (I.J. at 12-13; Tr. at

² Contrary to the respondent's arguments on appeal, the various articles in the record do not reflect that Honduran (b) (6). Rather, the country conditions evidence reflects that Honduras has a (b) (6) (Exh. 9).

(b) (6)

113-14).³ Moreover, the respondent has transferrable job skills as he is a chef and he previously supervised a kitchen staff of 7 employees at a restaurant in Honduras (I.J. at 13; Tr. at 119-20).

As the respondent did not meet his burden of proof for (b) (6), it follows that he did not meet (b) (6) (I.J. at 13). Section (b) (6) of the Act; (b) (6) (1984).

We also uphold the Immigration Judge's denial of the respondent's claim for (b) (6) as the respondent has not demonstrated that he is (b) (6) upon return to Honduras (I.J. at 13-14). See (b) (6). The respondent conceded that he did not report (b) (6) (I.J. at 11-12; Tr. at 98-99). Further, there is no evidence that the (b) (6) or that (b) (6) upon return (I.J. at 11-12). (A.G. 2006) (to qualify for (b) (6), the respondent must demonstrate that each step in the hypothetical chain of events is more likely than not to happen); see also (b) (6) (9th Cir. 2010) (b) (6) to the applicant is insufficient to establish (b) (6) eligibility).

For these reasons, we will dismiss the respondent's appeal.

ORDER: The appeal is dismissed.


FOR THE BOARD

³ The respondent's citation to (b) (6) (9th Cir. 1986) is inapt because in that case, the (b) (6) of Nicaragua, and the record supported a finding that (b) (6). See (b) (6) (where (b) (6), the respondent is entitled to a rebuttable presumption that (b) (6) is not reasonable). Here, in contrast, (b) (6) is not (b) (6) Honduras (b) (6), and there is no evidence that (b) (6), including the one that (b) (6) the respondent (b) (6) (I.J. at 11-13).

Falls Church, Virginia 22041

File: (b) (6) – Pompano Beach, FL

Date: SEP 23 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Katherine J. Santon, Esquire

APPLICATION: Reopening

ORDER:

The respondent is a native and citizen of El Salvador. On September 24, 2014, the Board dismissed the respondent's appeal. The record before the Immigration Judge indicated that the respondent was a (b) (6) (Exh. 1, (b) (6) Exh. 4, (b) (6) Application; Exh. 6, Resume of Life.) On July 15, 2015, the respondent filed an untimely motion to reopen. 8 C.F.R. § 1003.2(c). The respondent now (b) (6) to El Salvador because the respondent (b) (6) (Motion, Exh. N). The Department of Homeland Security has not filed a response.

We find that the respondent has presented sufficient material evidence of recent changes in (b) (6) in El Salvador pertaining to (b) (6), to warrant reopening and further development of the record. See (b) (6) (BIA 1996). Accordingly, the motion to reopen is granted, the proceeding is reopened, and the record is remanded to the Immigration Court for further proceedings and entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Los Angeles, CA

Date:

JUN 17 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Garish Sarin, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6)

The respondent, a native and citizen of India, has appealed the Immigration Judge's November 24, 2015, decision. The Immigration Judge denied the respondent's application for (b) (6) pursuant to, respectively, sections (b) (6) of the Immigration and Nationality Act, (b) (6). On appeal, the respondent contests the denial of all forms of relief. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.

We review an Immigration Judge's findings of fact, including findings with regard to credibility and the likelihood of future events, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *see also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review de novo all questions of law, discretion, and judgment and any other issues in appeals from decisions of Immigration Judges. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent claims that he is (b) (6) (I.J. at 2). The respondent claims that in Punjab, India, in 2010, he was (b) (6) (I.J. at 3). He testified that in (b) (6) 2011, he was (b) (6) (I.J. at 3-4). He also testified that in 2014, (b) (6) (I.J. at 4). He claims he was told that he (b) (6) (I.J. at 4).

The respondent contests the Immigration Judge's adverse credibility determination. The Immigration Judge found that the respondent provided implausible, inconsistent, and contradictory answers during his testimony (I.J. at 5). For example, the Immigration Judge found it implausible that (b) (6) the 2010 (b) (6) the respondent,

(b) (6)

contact newspapers about (b) (6) with the Assembly (I.J. at 5). The Immigration Judge noted that (b) (6) the respondent to (b) (6) (I.J. at 5). The Immigration Judge observed that when the respondent was asked why (b) (6) the respondent testified that (b) (6) that (b) (6) (I.J. at 5-6; Tr. at 223-25). The Immigration Judge doubted the respondent's explanation and found it unlikely that (b) (6) (I.J. at 6).

The respondent argues on appeal that the Immigration Judge engaged in speculation in finding his testimony regarding the (b) (6)'s response to (b) (6) implausible (Respondent's Brief at 4). We agree. The Immigration Judge did not cite evidence regarding how the (b) (6). We conclude that the Immigration Judge's determination that it was implausible that (b) (6) would (b) (6) on the respondent is based on speculation and is not a proper basis for her adverse credibility determination. See *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009) (finding that an adverse credibility determination cannot be based on speculation, conjecture, and assumptions).

The Immigration Judge also found it implausible that the respondent (b) (6) since 2011 even though he demonstrated clear knowledge of (b) (6) of his (b) (6) (I.J. at 6-7). The respondent claims on appeal that he (b) (6) (Respondent's Brief at 4; Tr. at 212). He also claims that his parents told him that he (b) (6) to obtain a passport so he could travel abroad (Respondent's Brief at 4-5; Tr. at 213-14). The respondent also points out that he testified that he was not (b) (6) (Respondent's Brief at 5; Tr. at 211, 215).

In addition, the respondent also argues that he submitted a letter from (b) (6) of (b) (6) in the United States to corroborate (b) (6) (Respondent's Brief at 5; Exh. 5 at 160). The respondent cites to the 2015 *United States Commission on* (b) (6) *Report*, which provides that (b) (6) (Respondent's Brief at 5; Exh. 5 at 166). Inasmuch as the respondent explained why (b) (6) and provided evidence that he is (b) (6), the cited implausibility regarding (b) (6) is not sufficient to support the Immigration Judge's adverse credibility determination.

The Immigration Judge also observed that the respondent made inconsistent statements regarding why (b) (6) (I.J. at 6-7). The Immigration Judge cited the respondent's testimony that he (b) (6) for the following reasons: 1) (b) (6); 2) his parents told him to do it so that he could get a passport; 3) to obtain a police clearance; and 4) to (b) (6) (I.J. at 6-7). Inasmuch as all of the reasons cited by the Immigration Judge relate to the respondent's or his parents' (b) (6) India, we do not find the citation of various but related reasons to be sufficient to support an adverse credibility determination (Tr. at 211-15).

(b) (6)

The Immigration Judge also found that the respondent first testified that he (b) (6) in the United States but later claimed that he was (b) (6) (I.J. at 6). She relied on this inconsistency to find the respondent incredible. The respondent claims that the Immigration Judge misplaced the context of the respondent's statement regarding (b) (6) (Respondent's Brief at 6-7).

We agree. The record indicates that the respondent testified that he (b) (6) in the United States as he had been in India (Tr. at 194-95). When further questioned, he testified that if his (b) (6) in Punjab, then I do (b) (6) (Tr. at 195). Subsequently, when asked how he (b) (6) and how he finds out about them, he testified that he finds out at the (b) (6) that there is "a certain (b) (6)" and then he (b) (6) (Tr. at 195). He testified that he (b) (6) (Tr. at 195). When the Immigration Judge asked the respondent to describe (b) (6) the respondent testified that it was a (b) (6) (Tr. at 196). The respondent further testified that he had not (b) (6) (Tr. at 196-97). He stated that he (b) (6) a (b) (6) (Tr. at 197-200).

Inasmuch as the respondent included the word (b) (6) in his initial response and later clarified that he (b) (6) we do not find the cited inconsistency regarding (b) (6) in the United States to be sufficient to support the Immigration Judge's adverse credibility determination.

The Immigration Judge also found that the respondent's testimony was inconsistent with the corroborating evidence submitted to support his claim (I.J. at 7). The respondent submitted two (b) (6) (I.J. at 7; Exh. 5 at 157; Exh. 6 at 172). He claimed that he was (b) (6) following the (b) (6) in 2010 (I.J. at 7; Tr. at 120-21). The respondent claimed that (b) (6) but the Immigration Judge pointed out that both reports contained check marks next to (b) (6)'s name and observed that the respondent was unable to explain why the check marks were on the reports (I.J. at 7). However, the respondent claimed that (b) (6) was the director and testified that he did not know why his name had check marks by it (Tr. at 121). The Immigration Judge relied on the check marks as a basis for undermining the respondent's claim (I.J. at 7). Nevertheless, such reliance, without other evidence that (b) (6) wrote both letters, is not a proper basis for the adverse credibility determination. Based on the foregoing, we find clear error in the Immigration Judge's adverse credibility determination. See (b) (6); see also section (b) (6) of the Act.

The Immigration Judge further found that the respondent did not adequately corroborate his claim. The respondent submitted (b) (6) (I.J. at 8; Exh. 4 at 100). The Immigration Judge observed that the respondent testified that his father received the (b) (6) 2010 but it was lost (I.J. at 8). Thereafter, the respondent's father in (b) (6) 2015 obtained a color-copy of the original (b) (6) with alterations made in blue pen

(b) (6)

(I.J. at 8). The Immigration Judge doubted the validity of (b) (6) because it was altered as evidenced by the blue pen markings, and there are boxes and lines on the report that are broken or misaligned. The (b) (6) was not submitted for a forensic evaluation. While the (b) (6) includes additions in blue ink, signatures in blue ink, and a stamp in blue ink, such additions are not necessarily inconsistent with the respondent's claim that the report was originally prepared in 2010 but then stamped in 2015 when the respondent asked his father to obtain a certified copy of (b) (6) (Respondent's Brief at 8; Exh. 4 at 100).

The Immigration Judge also noted that the affidavit from (b) (6) was revised regarding (b) (6) the respondent claimed to (b) (6) (I.J. at 9; Exh. 4 at 86; Exh. 5 at 155). The fact that (b) (6) a second affidavit correcting a date in the first affidavit is not sufficient to find that the respondent did not adequately corroborate his claim. Given the respondent's credible testimony and documents submitted to support his claim, we conclude that the respondent has adequately corroborated his claim. *See, e.g.*, Exh. 4 at 100; Exh. 5 at 157; Exh. 6 at 172.

The Immigration Judge also determined that had the respondent been a credible witness, she would have found that he (b) (6) (I.J. at 10-12). The Immigration Judge then found that the DHS had rebutted the presumption that the respondent has (b) (6) in India (I.J. at 12-15). However, the Immigration Judge at one point misstated the standard to be used for rebutting the presumption in (b) (6) cases. *See* I.J. at 12 (referring to whether the respondent's (b) (6)). The respondent also claims that the Immigration Judge misapplied the burden of proof in this case and erred in finding that the respondent had not presented any evidence to establish that he could not (b) (6) India (Respondent's Brief at 12-13; I.J. at 14).

The respondent is entitled to a regulatory presumption of (b) (6) which places the "rebuttal" burden on the DHS, not the respondent, to show by a preponderance of the evidence that there has been a (b) (6) such that the [respondent] no longer has (b) (6) in the [respondent's] country of nationality," or that he "could (b) (6) the [respondent's] country." (b) (6) (BIA 2008).

Furthermore, the United States Court of Appeals for the Ninth Circuit has held that an individualized analysis, focusing on the respondent's (b) (6) in relation to relevant country reports, is required when assessing whether there has been (b) (6) and whether the respondent (b) (6) (9th Cir. 2011) ("The hallmark of an 'individualized determination' is a tailored analysis of the (b) (6) applicant's] (b) (6)"); (b) (6) (9th Cir. 2000) ("[T]he determination of whether or not a particular applicant's (b) (6) requires an individualized analysis that focuses on the (b) (6) and the relationship to it of the particular information contained in the relevant country reports"). Even where (b) (6) Immigration Judges and the Board are required to assess whether the respondent "is among the

(b) (6)

(b) (6) ” (b) (6) (quoting (b) (6) (b) (6) (9th Cir. 2001)). See also *Gaksakuman v. U.S. Att’y Gen.*, 767 F.3d 1164, 1170-71 (11th Cir. 2014) (holding that silence in a State Department report about a matter pertinent to an individual’s application cannot rebut that individual’s evidence).

When assessing country conditions, the Immigration Judge considered (b) (6) (b) (6) in India, but did not meaningfully consider the respondent’s (b) (6) having been previously (and relatively recently) (b) (6) (b) (6). Therefore, we will remand the record to the Immigration Judge for an individualized analysis, based on the respondent’s (b) (6) of whether the DHS has established (b) (6) (b) (6) since the time of the past persecution, or that the respondent could (b) (6) (b) (6). The parties should be permitted to present additional evidence upon remand, including updated (b) (6) materials. The Immigration Judge should then enter a new decision on the respondent’s application for (b) (6) (b) (6).

Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the record is remanded to the Immigration Court for further proceedings and the entry of a new decision consistent with the foregoing opinion.


FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents. The Immigration Judge properly placed the burden on the DHS to show that the respondent could not (b) (6) (b) (6) India to (b) (6) but found that DHS has met that burden. I see no clear error in that finding and would dismiss the appeal. See I.J. 12-14.

¹ However, we are unable to locate support in the record for the respondent’s contention that the Immigration Judge evinced “bias” and provided a “one-sided analysis” (Respondent’s Brief at 14).

Falls Church, Virginia 22041

File: (b) (6) – San Diego, CA

Date: **JUN 28 2016**

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Lisa M. Torossian, Esquire

APPLICATION: Reopening

This case was last before the Board on March 3, 2015, when the Board dismissed the respondent's appeal from the Immigration Judge's October 27, 2014, decision denying the respondent's application for (b) (6).

¹ The Board agreed with the Immigration Judge and concluded, in part, that the respondent did not establish that (b) (6).

On May 13, 2016, alleging that he received ineffective assistance from former counsel, the respondent, a native and citizen of El Salvador, filed the present motion to reopen. The respondent's motion will be denied.²

Although the respondent contends that he only first discovered the alleged deficient performance of former counsel when he hired current counsel in or around (b) (6) 2015, the respondent does not dispute that he was, at the very least, aware of both the Immigration Judge's and the Board's decisions entered in this case. Nor does he dispute that he was aware that his claim was denied because he did not establish a (b) (6).

Further, the respondent does not assert, nor does the submitted evidence reflect, that he was prevented from timely filing the present motion by "deception, fraud, or error." *See Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011); *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). Indeed, he hired former counsel to appeal the Immigration Judge's decision to the Board and, subsequently, to file a petition for review of the Board's decision with the United States Court of Appeals for the Ninth Circuit, which was denied in or around (b) (6) 2015.

¹ The respondent's motion reflects that a petition for review of this decision is pending before the United States Court of Appeals for the Ninth Circuit. The parties should advise the Ninth Circuit of the entry of this order.

² However, his fee waiver request is granted. *See* 8 C.F.R. § 1003.8(a)(3).

Other than hiring current counsel, the respondent has not offered a coherent and persuasive explanation for waiting more than 1 year from the Board's decision in this case and about 5 months after discovering that his petition for review had been denied to file the present motion. Under the circumstances, we do not find that the respondent has sufficiently demonstrated that he exercised due diligence in pursuing his claim against former counsel. *See Iturribarria v. INS, supra*; *see also Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (stating that the doctrine of equitable tolling applies when "despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim.>").

Moreover, on this record, we cannot find that former counsel's alleged poor performance prevented the respondent from reasonably presenting his claim, or that former counsel's performance was so inadequate that it may have affected the outcome of the proceedings. *See Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002). The respondent has neither proffered nor identified any arguments or evidence beyond what was before either the Immigration Judge or the Board in support of his claim that (b) (6).

. Additionally, we lack authority in these removal proceedings to adjudicate issues related to bond. Such matters must be addressed in the context of separate bond proceedings.

Thus, notwithstanding the respondent's substantial compliance with the guidelines described in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988), the respondent has not sufficiently demonstrated the required prejudice stemming from any alleged action or inaction of her prior counsel. *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Lozada, supra*; *see also Maravilla Maravilla v. Ashcroft, supra*; *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003); *Rodriguez-Lariz v. INS, supra*. *See also Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) (directing Board to apply *Lozada* standards to ineffective assistance of counsel claims pending the outcome of a rulemaking process).

In sum, on this record, the respondent has not provided an adequate basis to excuse the untimeliness of the present motion. Nor has he demonstrated an exceptional situation that would warrant reconsideration of the prior Board decision or reopening of these removal proceedings in the exercise of discretion under the Board's sua sponte authority. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). Accordingly, we will enter the following order.

ORDER: The respondent's motion and related request for a stay of removal are denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) - Houston, Texas

Date:

OCT - 9 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Olusegun Asekun, Esquire

APPLICATION: Reopening

ORDER:

The respondent seeks the timely reopening of proceedings last before the Board on July 15, 2015 in order to seek the privilege of voluntary departure.¹ However, insofar as the respondent was placed in proceedings within a year of her arrival in the United States she is ineligible for that relief and therefore the motion cannot be granted.

Eligibility for section 240B(b)(1), voluntary departure requires (1) physical presence in the United States for a period of at least 1 year immediately preceding service of the notice to appear; (2) good moral character for 5 years immediately preceding application; (3) a finding that the respondent is not deportable on the basis of a conviction for an aggravated felony or on grounds relating to espionage, sabotage, terrorism, and national security; and (4) a showing that the respondent has the means to depart the United States and intends to do so. *See* section 240B(b)(1) of the Act, 8 U.S.C. § 1229c(b)(1); 8 C.F.R. § 1240.26(c)(1); *see also* *Matter of C-B-*, 25 I&N Dec. 888, 891 -892 (BIA 2012); *Matter of Arguelles*, 22 I&N Dec. 811, 816 (BIA 1999).

Insofar as the respondent is not eligible for the relief that she seeks through a reopened proceeding, the motion before us does not present an exceptional situation that would warrant sua sponte reopening of these proceedings. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. § 1003.2(c)(1). Accordingly, the motion to reopen is denied.


FOR THE BOARD

¹ A partial paragraph at the end of the respondent's motion addresses (b) (6), Immigration Judge discretion, and seeks reversal of the decision of the Immigration Judge. We will assume that that partial paragraph was included in error as it is distinct from the focus of the motion on the respondent's interest in voluntary departure.

Falls Church, Virginia 22041

File: [REDACTED] (b) (6) - Los Angeles, CA

Date:

JUN 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Petro R. Kostiv, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: (b) (6)

The respondent has appealed from the Immigration Judge's decision dated November 9, 2015.¹ The Immigration Judge denied the respondent's applications for (b) (6). See sections (b) (6) of the Immigration and Nationality Act, (b) (6). The record will be remanded.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The Immigration Judge found the respondent credible (I.J. at 5).

The respondent, a (b) (6)-year-old native and citizen of El Salvador, was determined to be an (b) (6) after entering the United States in 2014 (I.J. at 1-2; Exh. 1). As such, his (b) (6) application was initially considered by U.S. Citizenship and Immigration Services ("USCIS"), but the application was not granted (I.J. at 1, n.1; Tr. at 19; Exh. 4, USCIS "(b) (6) Decision Notice for Non-Eligibility" dated February 3, 2015).

The respondent testified as follows. He (b) (6) El Salvador (b) (6) (I.J. at 2; Tr. at 39, 43). His uncle (b) (6) 2011 (b) (6), who was (b) (6) (I.J. at 2; Tr. at 39-40, 42; Exhs. 3, Tabs C-I). The respondent does not (b) (6), but he believes (b) (6) (I.J. at 2; Tr. at 41-42). The respondent has (b) (6) El Salvador, but his cousins have

¹ Although the respondent requested and received an extension of time in which to file his appeal brief, he did not file his brief until after the extended deadline. The respondent's untimely brief was rejected on March 9, 2016. Therefore, we consider only the arguments raised by the respondent in the Notice of Appeal.

(b) (6)

(b) (6) and (b) (6), which the respondent does (b) (6) (I.J. at 2; Tr. at 42-44, 46).

Upon de novo review, we agree with the Immigration Judge that the respondent has not (b) (6). The Immigration Judge correctly determined that the respondent did not establish that (b) (6) in El Salvador (I.J. at 5). The respondent himself was (b) (6) in El Salvador (I.J. at 5). His (b) (6) claim is based (b) (6) could contribute to a (b) (6) in 2011 and the respondent remained in El Salvador for several years (b) (6). See (b) (6) (9th Cir. 2009) (explaining that (b) (6) to an alien's (b) (6) may contribute to a successful (b) (6) if the alien demonstrates that (b) (6) respondent himself), citing (b) (6) (9th Cir. 1991).

Because the respondent has not shown (b) (6), he is not entitled to a rebuttable presumption of (b) (6). (b) (6) Under the REAL ID Act, the applicant must establish that (b) (6) for the applicant's (b) (6). See section (b) (6) of the Act; see also (b) (6) (9th Cir. 2009) (stating that the Real ID Act requires that a (b) (6) for (b) (6) applicant's (b) (6)). The respondent asserts that he has (b) (6) and cannot (b) (6) (I.J. at 2, 5; Exh. 3, Tab A; Tr. at 29-30).

To the extent that he (b) (6), the respondent has not sufficiently distinguished his (b) (6) does not constitute a (b) (6) (I.J. at 5). See (b) (6) (9th Cir. 2009) (holding that (b) (6) did not constitute a (b) (6)); (b) (6) (9th Cir. 2008) (holding that (b) (6)); see also (b) (6) (BIA 2014), and (b) (6) (BIA 2008), clarified by (b) (6). Further, the respondent's (b) (6) in El Salvador does not support a claim of (b) (6). See (b) (6) (9th Cir. 2010) ("An alien's desire to be (b) (6) by (b) (6)"); (b) (6) (9th Cir. 2001) ("(b) (6) generally is not available to (b) (6)"); see also (b) (6) ("(b) (6) and (b) (6) laws do not (b) (6)").

We find, however, that a remand is appropriate for the Immigration Judge to make additional fact-findings regarding the respondent's (b) (6)

(b) (6) and cannot (b) (6)

The Immigration Judge found that the respondent's (b) (6) the (b) (6) (I.J. at 5). See

generally (b) (6). However, in

evaluating (b) (6), the Immigration Judge relied (b) (6) cases

and did not specifically address the (b) (6) of the respondent's (b) (6)

(I.J. at 5). On remand, the respondent should be given an opportunity to submit additional evidence regarding his (b) (6).

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) -- San Antonio, TX

Date: NOV - 9 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Manoj Govindaiah, Esquire

APPLICATION: Reconsideration

This proceeding was last before the Board on July 28, 2015, when we dismissed the respondent's appeal. The respondent has now filed a timely motion to reconsider. 8 C.F.R. § 1003.2(b). The Department of Homeland Security has not filed a response. The motion to reconsider is granted and the record is remanded for further proceedings.

The respondent claims (b) (6) based on (b) (6) (BLA 2014), in which we found that (b) (6) depending on the facts and evidence in a given case. The Immigration Judge entered a mixed credibility finding. He accepted as fact that the respondent was a (b) (6), but noted inconsistent testimony regarding the duration of (b) (6) (I.J. at 2-4). The Immigration Judge determined that the respondent was not eligible for relief because she was (b) (6) (I.J. at 6). On appeal, we accepted the respondent's testimony as credible, and dismissed the appeal.

In her motion, the respondent contends that (b) (6) is not a factor in analyzing whether her (b) (6) under the Immigration and Nationality Act. We agree. Our decision in (b) (6), does not necessarily require that the applicant (b) (6). The (b) (6) is not a distinguishing factor that would preclude an otherwise viable claim. Rather, we look to the (b) (6) to determine its nature. Since the Immigration Judge is the trier of fact, we will remand the record for further consideration, inter alia, of the characteristics of the respondent's (b) (6). Accordingly, the record will be remanded for further proceedings and analysis as to whether the respondent is credible, whether (b) (6), and whether she is otherwise eligible for relief from removal. The following orders shall be issued.

ORDER: The motion is granted, and the prior decisions of the Board and Immigration Judge are vacated.

FURTHER ORDER: The record is remanded for further proceedings in accordance with this decision.


FOR THE BOARD

Falls Church, Virginia 22041

Files: (b) (6) – Fort Snelling, MN

Date: JAN 13 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Timothy P. Fadgen, Esquire

APPLICATION: Reconsideration; reopening

This case was last before the Board on November 2, 2015, when we dismissed the respondents' appeal. The respondents have now timely filed a motion to reconsider. As the respondents have submitted evidence with their motion, it is also in the nature of a motion to reopen. The Department of Homeland Security ("DHS") has not filed a response to the pending motion. The respondents' motion will be granted and the record will be remanded for further proceedings.

The respondents claim (b) (6) based on (b) (6) (BIA 2014), wherein the Board found that (b) (6) depending on the facts and evidence in an individual case. The Immigration Judge determined that the respondents were not eligible for relief because the lead respondent was (b) (6), because she was (b) (6).

With their motion, the respondents submitted a recent unpublished decision issued by the Board stating that an applicant for (b) (6) does not necessarily have to show that she has (b) (6). The absence of (b) (6) is not always a distinguishing factor that would preclude an otherwise viable claim. Rather, we look to the characteristics of (b) (6) to determine its nature. As the Immigration Judge is the trier of fact, we will remand the record for further consideration, inter alia, of the characteristics of the lead respondent's (b) (6) and a determination of its nature. The same decision cited by the respondents in their motion also discusses the fact that respondent there testified that she knew (b) (6). The respondents herein have made the same claim with respect to Honduras, and the record contains evidence indicating that (b) (6) there and is committed with (b) (6).

In view of this, and the arguments made in the respondents' motion, we will grant the motion to reconsider and reopen and will remand the case to the Immigration Judge. Accordingly, the record will be remanded for further proceedings and analysis as to whether the respondents' (b) (6), and whether they are otherwise eligible for relief from removal. Accordingly, the following orders will be entered.

ORDER: The motion is granted, and the Board's November 2, 2015, decision dismissing the respondents' appeal is vacated.

FURTHER ORDER: The record is remanded for further proceedings not inconsistent with the foregoing opinion.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Pompano Beach, FL

Date:

MAY - 6 2015

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Linda Osberg-Braun, Esquire

ON BEHALF OF DHS: Shana Belyeu
Assistant Chief Counsel

APPLICATION: (b) (6); remand

The respondent appeals from the Immigration Judge's December 30, 2015, decision denying his applications for (b) (6) under section (b) (6) of the Immigration and Nationality Act, (b) (6); (b) (6) under section (b) (6) of the Act, (b) (6); and (b) (6). The respondent subsequently filed a motion to remand alleging ineffective assistance of counsel. The Department of Homeland Security ("DHS") moves for summary affirmance. The appeal will be dismissed and the motion will be denied.

We review findings of fact, including credibility findings and determinations as to the likelihood of future events, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

In the proceedings before the Immigration Judge, the respondent sought (b) (6) and related (b) (6) (I.J. at 5; Tr. at 16; Exh. 7). The respondent testified that he was (b) (6) (I.J. at 3; Tr. at 19-24). He testified that he was (b) (6) and that he would be (b) (6) (I.J. at 4; Tr. at 19-24). He was also (b) (6) China (I.J. at 4; Tr. at 22-23). He (b) (6) in China if he were to return.

On appeal, the respondent argues that the record should be remanded on the ground that he received ineffective assistance of counsel during the proceedings before the Immigration Judge (Respondent's Motion to Remand filed on March 30, 2016, at pages 2-5; Respondent's Br. at pages 2-9).

Notwithstanding the respondent's assertions, we conclude that he has not established that he received ineffective assistance of counsel or that he was deprived of his rights to due process or a fundamentally fair hearing. In particular, we conclude that the respondent has not substantially complied with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), as is necessary to establish a claim of ineffective assistance of counsel. The respondent provided a statement, which discusses, to some extent, the agreement with his prior attorney, Aisha Ching, as well as a copy of a bar complaint filed with the State of California (Respondent's Motion to Remand at Tab A; Respondent's Br. at Tab A). See *Matter of Lozada*, *supra*, at 639. However, the respondent has not shown that his former attorney was informed of the allegations against her and afforded an opportunity to respond. See *id.*¹ We find this particularly troubling given the nature of the allegations asserted by the respondent.

Moreover, we conclude that the respondent has not established that he was prejudiced by his former counsel's performance, such that he has presented a valid claim of ineffective assistance of counsel. See *Ali v. U.S. Att'y Gen.*, 643 F.3d 1324, 1329 (11th Cir. 2011) (alien must establish prejudice in order to prevail on ineffective assistance claim); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). The respondent asserts that former counsel, Ms. Ching, never communicated with him because she is unable to speak the Mandarin language (Respondent's Motion to Remand at pages 2-3). He further alleges that this lack of communication deprived him of the opportunity to fully discuss his (b) (6) claim and to review strategy including the potential use of an expert witness and the submission of (b) (6) (Respondent's Motion to remand at page 3).

The respondent's assertions do not persuade us that the Immigration Judge may well have reached a different result had his former counsel undertaken the actions that are now raised. To that end, the respondent has not indicated how expert testimony or the submission of his arrest warrant would have resolved the inconsistencies in his testimony, (b) (6), and documentary evidence. Further, while the respondent alleges issues in translation both with his attorney and at his (b) (6), he does not cite to any specific translation error. Nor has he indicated how the potential testimony in this regard would pertain to a claim (b) (6) for purposes of establishing eligibility for (b) (6). See (b) (6).

As the respondent has not specified how the asserted missing expert testimony or (b) (6) materially affects his eligibility for the relief sought, we conclude that he has not established the requisite prejudice for an ineffective assistance of counsel claim or that he was otherwise denied due process. See *Matter of Santos*, 19 I&N Dec. 105, 107 (BIA 1984) (stating that "an alien must have been prejudiced by a procedural defect in his deportation proceeding

¹ Current counsel asserts in her appeal brief and motion to remand that "Undersigned counsel has notified Ms. Ching of the complaint against her"; however, evidence of this notification has not been submitted (Respondent's Motion to Remand at page 3; Respondent's Br. at page 6). *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (Statements of counsel are not considered evidence).

before he will be found to have suffered a denial of due process"). Accordingly, we decline to grant the respondent's request to remand the record for further proceedings.

Turning to the respondent's applications for relief, we do not find the Immigration Judge's adverse credibility finding regarding the respondent to be clearly erroneous. See 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (discussing the highly deferential nature of "clear error" review). The Immigration Judge based his adverse credibility finding on specific and cogent reasons, including inconsistencies and omissions in the respondent's account (I.J. at 5-8). See section (b) (6) of the Act; (b) (6) (11th Cir. 2005).

As the Immigration Judge found, the omissions and inconsistencies between the respondent's testimony, his (b) (6) application, and his statements to (b) (6) undermine his credibility (I.J. at 6-8). See generally *Lyashchynska v. U.S. Att'y. Gen.*, 676 F.3d 962, n.5 (11th Cir. 2012) (explaining that post-REAL ID Act credibility determinations need not be based on inconsistencies that go to the heart of the claim). First, the respondent testified that he (b) (6), but he wrote in his (b) (6) application (Form I-589) on page 5 of his accompanying statement that (b) (6) (Compare I.J. at 6, Tr. at 17, 25-26, 28; with Exh. 7, Tab A). The respondent's only explanation was that "it must be a mistake" (Tr. at 29). Next, at his (b) (6), the respondent was asked if (b) (6) him and he answered "that I am not sure" (I.J. at 6; Exh. 3 at page 4). When asked to explain, the respondent testified that "it's not different" and "I don't quite recall" (I.J. at 6; Tr. at 29-31).

Further, at his (b) (6), the respondent stated that after he was (b) (6) but that he (b) (6) (I.J. at 6; Exh. 3 at page 5). Conversely, at his hearing, the respondent testified that (b) (6) (I.J. at 6; Tr. at 32-33). The respondent attempted to explain this discrepancy by saying that he (b) (6) but did not and that it must have been a problem in translation (Tr. at 33). However, as the DHS pointed out, at the end of the (b) (6) the respondent's testimony was summarized back to him including his statements regarding (b) (6) (Tr. at 33; Exh. 3 at page 9). To this the respondent could not give a sufficient explanation (Tr. at 33). Finally, when asked by the DHS when he (b) (6) in the United States, the respondent could not remember and eventually said (b) (6) but the (b) (6) that he submitted to the court shows that he was (b) (6), 2015 (Compare I.J. at 7. Tr. at 34; with Exh. 8 at page 50). We find no clear error with the Immigration Judge's conclusion that the respondent's explanations were not persuasive (I.J. at 14).

The Immigration Judge also correctly determined the respondent did not adequately corroborate his claim where he did not submit affidavits or other independent evidence. See *Yang v. U.S. Att'y. Gen.*, 418 F.3d 1198, 1201 (11th Cir. 2005) (recognizing the increasing importance of corroboration the weaker an alien's testimony); *Lyashchynska v. U.S. Att'y. Gen.*, *supra*, at 968.

(b) (6)

The respondent's arguments on appeal do not persuade this Board that the Immigration Judge's finding that he was not credible is clearly erroneous. While the respondent alleges ineffective assistance of counsel and even taking his allegations as true, we do not find his prior counsel's lack of language ability impacted the Immigration Judge's credibility determination based on the respondent's own inconsistent testimony (*See* Respondent's Motion to Remand at pages 3-4; Respondent's Br. at pages 6-9). Both at the (b) (6) and the final hearing, the respondent testified through a Mandarin interpreter (Tr. at 14-15; Exhs. 2, 3). At no time in either of these hearings did the respondent indicate that he had any issues with the interpreter or translation and only when confronted with obvious inconsistencies in his testimony did the respondent vaguely allege that one of his inconsistencies must have been a mistake in translation (Tr. at 33). Again, as the DHS pointed out, the respondent's testimony was summarized in Mandarin at the end of his (b) (6) and the respondent indicated it was true and correct (Tr. at 33; Exh. 3 at page 9). Even excluding the inconsistency related to the respondent's (b) (6) application, the respondent has not established that the Immigration Judge's rejection of his testimony as lacking in credibility is clearly erroneous. *See* section 240(c)(4)(C) of the Act; *Xia v. U.S. Att'y Gen.*, 608 F.3d 1233, 1240 (11th Cir. 2010).

As he has not met the burden of proof for (b) (6), the respondent also does not meet the (b) (6). (b) (6) (1984).

We also find no clear error in the Immigration Judge's determination that the respondent did not demonstrate that he (b) (6) (I.J. at 10). (b) (6).

Finally, we note that the respondent has submitted a copy of an (b) (6) on appeal and with his motion to remand (Respondent's Motion to Remand at Exh. B; Respondent's Br. at Exh. B). However, we do not find that the document submitted is likely to change the outcome of proceedings given our affirmation of the Immigration Judge's adverse credibility determination. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). Accordingly, the following orders are entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Lumpkin, GA

Date:

JUN 28 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Blake Doughty
Assistant Chief Counsel

APPLICATION: Reconsideration; reopening

The respondent has filed a timely motion requesting the Board reconsider our decision of March 15, 2016, in which we dismissed the respondent's appeal from the Immigration Judge's removal order. The respondent has also submitted a supplement presenting additional evidence and seeks reopening on that basis. 8 C.F.R. § 1003.2(c)(1). The Department of Homeland Security opposes reopening. The respondent's motion will be denied.

A motion to reconsider must identify a material error of fact or law in the decision for which reconsideration is being requested. 8 C.F.R. § 1003.2(b)(1); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). The respondent argues that the Board erred in stating that he conceded the charge of removability under section 237(a)(1)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(C)(i); erred in declining to address the respondent's remaining charges of removability; and that the Board should have concluded he merited an additional continuance.

The Board did not err in stating that the respondent had conceded the charge under section 237(a)(1)(C)(i) of the Act. Contrary to the respondent's contention that he simply acceded to the change in allegation associated with the charge, the transcript reflects that he conceded to the changed allegation, as well (Tr. at 454). The respondent's Notice of Appeal also stated that he "conceded" to a "visa overstay." Though the respondent argues that his attendance at Loyola was not related to the issuance of his J-1 visa, the respondent was the one who originally asserted that the program he entered the United States to pursue was the Loyola educational program (Tr. at 450-51). Regardless of whether that was the specific program which he was admitted to pursue, the respondent does not dispute that he failed to comply with the requirements of his non-immigrant visa.

The Board also did not err in declining to address whether the respondent was removable under sections 237(a)(2)(A)(i) and 237(a)(2)(E)(i) of the Act. The respondent relies on an unpublished decision from the Eleventh Circuit, which stated that in that particular case a remand was warranted for the Board to address whether consideration of additional grounds of removability was appropriate. See *Oshunrinde v. United States Atty. Gen.*, 506 Fed.Appx. 881 (11th Cir. 2013). The case, which is not binding authority, did not stand for a general principle that the Board must address all grounds of removability in all cases.

The Board also did not err in concluding the respondent did not establish an additional continuance was warranted. He acknowledges that he had no evidence that his I-130 visa petition was pending at the time of his final hearing and that the petition had been submitted to Citizenship and Immigration Services less than two weeks prior. However, he argues that the alien also had not submitted evidence that his I-130 petition was pending in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). Yet the Board did not conclude that the alien in *Matter of Hashmi* was entitled to a continuance; rather, the Board remanded to allow the Immigration Judge to consider the relevant factors in the first instance. The factors articulated in *Matter of Hashmi* were properly applied in this case.

The respondent's motion to reopen also argues that he was deprived of the right to contest the charges against him. To the extent that the respondent argues the Board erred, this argument is an extension of his motion to reconsider. As this assertion was not raised in the respondent's appeal it is accordingly waived. See *Matter of Edwards*, 20 I&N Dec. 191, 196-97 n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived). Moreover, the respondent did have an opportunity to contest the charges, and he spoke with the Immigration Judge and government counsel about the charges below. The respondent's motion to reconsider will be denied.

The respondent also argues that reopening is warranted on the basis of ineffective assistance of counsel. Specifically, he contends that if prior counsel had filed the I-130 petition in a more timely manner he may have had a receipt demonstrating that the application was pending at the time of the final hearing. The respondent has substantially complied with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). However, he has not established he was prejudiced. The respondent has a criminal conviction for a domestic assault, which may constitute a crime involving moral turpitude. See *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). Furthermore, even if the respondent's counsel had immediately filed the I-130 petition and obtained a filing receipt, the respondent still waited a significant length of time before attempting to file an I-130 or seek a collateral attack on his criminal conviction (I.J. at 10). We are not persuaded the respondent might have obtained an additional continuance absent his attorney's alleged deficiencies.

As a final matter, the respondent repeatedly alleges that he had a pending application for cancellation of removal which was not sufficiently addressed. However, the respondent did not apply for cancellation below. The motion to reopen will therefore be denied.

ORDER: The respondent's motion is denied.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Tacoma, WA

Date:

MAR 29 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Bart R. Parsley, Esquire

APPLICATION: (b) (6); remand

The respondent, a native and citizen of Bangladesh, appeals the Immigration Judge's October 15, 2015, decision denying his applications for (b) (6) under sections (b) (6) of the Immigration and Nationality Act, (b) (6). During the pendency of his appeal, the respondent filed a motion to remand. The Department of Homeland Security ("DHS") has not filed an opposition to the motion. The motion will be granted and the record will be remanded.

In denying the respondent's applications for (b) (6), the Immigration Judge found that, while credible, the respondent did not establish (b) (6) (I.J. at 20-21). In the alternative, the Immigration Judge found that even if the respondent established (b) (6), the DHS had proved by a preponderance of the evidence that the respondent could (b) (6) Bangladesh, thus rebutting the presumption of (b) (6) (I.J. at 25-27). The Immigration Judge further concluded that, independent of a finding of (b) (6), the respondent did not establish (b) (6) (I.J. at 27-32).

Through his motion, the respondent has submitted new, material and previously unavailable evidence indicating a change in his circumstances. See 8 C.F.R. § 1003.1(c). In his motion, the respondent indicates that on (b) (6), 2015, several months after his merits hearing, (b) (6) in (b) (6) the respondent, (b) (6) his family's home, (b) (6) his younger brother (Motion at 5-6). The respondent submitted several affidavits, photographs, and (b) (6) as corroboration of (b) (6). Given the Immigration Judge's reasons for the denial, including that the respondent did not establish (b) (6) or a (b) (6), we find that a remand is warranted for the Immigration Judge to consider the new evidence. See *Matter of L-A-C-*, 26 I&N Dec. 516, 526 (BIA 2015) ("A motion to remand for the purpose of presenting additional evidence must conform to the same standards as a motion to reopen and will only be granted if the evidence was previously unavailable and would likely change the result in the case."); see generally (b) (6) (BIA 2007) (acts of (b) (6) to the applicant himself if there is (b) (6) to the applicant personally). The Immigration Judge should further consider this new evidence in reassessing

her conclusions related to the respondent's (b) (6) Bangladesh (I.J. at 25-27, 31-32).

On remand, the parties should have the opportunity to update the record, and to make any additional legal and factual arguments that may apply to this case. The Board expresses no opinion regarding the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The motion is granted and the record is remanded for further proceedings consistent with the foregoing decision and for the entry of a new decision by the Immigration Judge.



FOR THE BOARD

Falls Church, Virginia 22041

File: (b) (6) – Adelanto, CA

Date: JUN 24 2016

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sui Chung, Esquire

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: (b) (6)

The respondent, a native and citizen of Ghana, has timely filed an appeal from an Immigration Judge's decision dated December 22, 2015. The Immigration Judge found the respondent removable as charged, denied her applications for (b) (6) pursuant to (b) (6) of the Immigration and Nationality Act (the "Act"), (b) (6) respectively, and her request for (b) (6), and ordered the respondent removed. The respondent's request for oral argument before this Board is denied. *See* 8 C.F.R. § 1003.1(e). On appeal, the respondent contests the denial of all three forms of relief. The record will be remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that, while the respondent was credible, she had not sustained the burden of proof for (b) (6) because she did not (b) (6) in Ghana on (b) (6) under the Act (I.J. at 4-7). *See* sections (b) (6) of the Act; *see also* (b) (6). For the reasons detailed below, we will reverse the Immigration Judge on some of his findings, and remand for further factfinding.

On appeal, the respondent challenges the Immigration Judge's finding that she was not a (b) (6) (I.J. at 6-7). Specifically, the respondent argues that she is (b) (6)

(Respondent's Appeal Brief at 14). The respondent cites to the Board's

(b) (6)

decision in (b) (6) (BIA 2014) (discussing (b) (6) in (b) (6)). In that case, we held that, depending on the facts and evidence in an individual case, (b) (6) that forms the basis of a claim for (b) (6) under sections (b) (6) of the Act.

The Immigration Judge specifically considered (b) (6), but found that the facts and evidence in this instant case rendered the respondent's situation distinguishable from that of the alien in that case. Specifically, he found that in this case the respondent: (1) is not (b) (6); (2) was (b) (6); and (3) did (b) (6) (I.J. at 6-7). He concluded that the holding of (b) (6) (I.J. at 6). We disagree with this narrow interpretation, and we find that the respondent's (b) (6), and the respondent has (b) (6) in it. *See, e.g.* (b) (6) (BIA 2014), and (b) (6) (BIA 2014) (clarifying what is required to establish a (b) (6)).

The Board recently clarified the elements required to establish (b) (6). *See* (b) (6) (BIA 2014), and (b) (6) (BIA 2014) (clarifying what is required to establish (b) (6)). An applicant for (b) (6) must establish that (b) (6). *See* (b) (6). As indicated above, we also have held that depending on the facts and evidence in an individual case, (b) (6) that forms the basis of a claim for (b) (6). (b) (6) (discussing (b) (6) determinations).

The respondent's (b) (6) is defined by terms that make it sufficiently (b) (6)

. In this case, the evidence of record, including (b) (6) evidence, establishes that the (b) (6) (Exh. 4 at 14, 15).

We do not agree with the Immigration Judge's assertion that the respondent's (b) (6) was not (b) (6) (I.J. at 7). In (b) (6) we reasoned that (b) (6) depending on the facts and circumstances of the case, but we did not require that (b) (6). In this case, the respondent's (b) (6) is shown by

(b) (6)

the fact that they have three children together and lived together for 11 years. Also, the Immigration Judge's finding that the respondent was (b) (6) is clearly erroneous (I.J. at 7). The respondent testified that after she (b) (6). She also (b) (6) (Tr. at 53, 56).

While the Immigration Judge did not directly address whether (b) (6) the respondent credibly testified to (b) (6), we have little difficulty in finding that the fact that (b) (6). See, e.g., (b) (6) (9th Cir. 2000) (finding that "Where an applicant (b) (6), and as in this case is (b) (6) a period of years, the (b) (6) that no reasonable fact-finder could conclude that it did (b) (6), particularly when (b) (6) are considered along with the (b) (6)"); (b) (6) (9th Cir. 1998) (finding that the cumulative effect of (b) (6)).

However, in order to qualify as (b) (6) for the purpose of (b) (6) must be (b) (6). See, e.g., (b) (6) (9th Cir. 2004). Thus, in this case the respondent must establish that (b) (6) Ghana (b) (6). We find that further factfinding is required on this issue.

We observe that the 2014 U.S. Department of State's Country Reports on (b) (6) for Ghana indicates that (b) (6) in Ghana, and that "(b) (6) ," which would lend credence to her claim (b) (6) would have been futile (Exh. 4 at 14-15). In assessing the question whether the (b) (6) the respondent, the Immigration Judge emphasized that the respondent had not reported the fact that there (b) (6). When asked at her hearing why she did not (b) (6), she repeatedly stated that she was (b) (6), which is somewhat unclear (Tr. at 53-54). However, presumably an event as significant as (b) (6) even without the respondent (who was in the (b) (6)). Further, the respondent did not state that she (b) (6). Under these circumstances, we find that the issue of whether (b) (6) should be further considered on remand.

On remand, the parties should be afforded an opportunity to update the record, and to make any additional legal and factual arguments desired regarding the respondent's eligibility for relief from removal. The Board expresses no opinion regarding the ultimate outcome of these proceedings.

Given our decision to remand, we do not now reach the Immigration Judge's denial of (b) (6), or the respondent's related arguments on appeal.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.


FOR THE BOARD

(b) (6)
Only the Westlaw citation is currently available.
United States Court of Appeals,
Ninth Circuit.

(b) (6)
(b) (6), Petitioner,
v.
Loretta E. LYNCH, Attorney General, Respondent.
No. (b) (6) | Submitted (b) (6), 2015. | Filed
(b) (6) 2015.

Synopsis

Background: Alien, a native of Guatemala, petitioned for review of decision of Board of Immigration Appeals (BIA) affirming immigration judge's (IJ) denial of his application for (b) (6).

Holdings: The Court of Appeals, [McKeown](#), Circuit Judge, held that:

[1] substantial evidence supported BIA's denial of (b) (6), but

[2] BIA erred in not addressing his (b) (6)

Petition granted in part and denied in part.

West Headnotes (4)

[1] Aliens, Immigration, and Citizenship



Substantial evidence supported Board of Immigration Appeals' (BIA) conclusions that alien, a native of Guatemala, failed to establish a (b) (6)

(b) (6), precluding alien's claim for (b) (6) based on likelihood of

(b) (6); BIA
concluded that alien had (b) (6)

Cases that cite this headnote

[2] Aliens, Immigration, and Citizenship



Alien, a native of Guatemala, raised in his brief to Board of Immigration Appeals (BIA) his claim for (b) (6)

(b) (6) and in so doing, he properly exhausted his administrative remedies, and thus BIA was required to review his claim; alien claimed that (b) (6)

(b) (6), and later (b) (6), even though she had not (b) (6)

Cases that cite this headnote

[3] Aliens, Immigration, and Citizenship



An applicant for (b) (6) on the (b) (6)

Cases that cite this headnote

[4] Aliens, Immigration, and Citizenship



(b) (6)



Cases that cite this headnote

Attorneys and Law Firms

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On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. A200–244–399.

Before SIDNEY R. THOMAS, Chief Judge and MICHAEL DALY HAWKINS and M. MARGARET McKEOWN, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

*1 This appeal requires us to consider the meaning of (b) (6) proceedings under the immigration laws. Providing a precise definition for this inherently flexible term, which is not defined in the legislation, has long bedeviled those tasked with adjudicating (b) (6) claims. In recognition of these semantic difficulties, the Board of Immigration Appeals (“Board” or “BIA”) recently clarified the criteria for assessing (b) (6) claims. (b) (6) (B.I.A.2014). Under the Board’s refined test, to establish eligibility for (b) (6)

“a petitioner must show that (b) (6)

(b) (6)

Id. at 237.

(b) (6) made such a claim. Before the BIA, he argued that he (b) (6) in his native Guatemala both because of (b) (6)

(b) (6). Focusing exclusively on (b) (6) claims, the BIA rejected the appeal.

BACKGROUND

(b) (6) petitions for review of the BIA decision affirming the denial of his application for (b) (6)

(b) (6) entered the United States without inspection on September 10, 2007. On (b) (6), 2009, (b) (6)

(b) (6) in Guatemala. (b) (6) and agreed to (b) (6). She was (b) (6) before the hearing. (b) (6) asserts that she was (b) (6)

(b) (6). In the (b) (6), (b) (6), even though (b) (6)

Due to (b) (6) to the United States.

Before the IJ, (b) (6) argued that he and (b) (6) and that he (b) (6) in Guatemala on the (b) (6) also claimed that (b) (6)

(b) (6). The IJ rejected (b) (6) claims, referencing a newspaper article introduced by (b) (6), which described his (b) (6)

(b) (6). The IJ found that (b) (6) not (b) (6)

(b) (6). The IJ further noted a then-pending Ninth Circuit en banc decision, (b) (6), which related to whether (b) (6) could qualify as (b) (6)

(b) (6) for purposes of establishing (b) (6) eligibility.² The IJ concluded that, regardless of the outcome of the en banc decision, (b) (6) would be inapplicable because (b) (6) did not (b) (6).

*2 On appeal to the BIA, (b) (6) reiterated his (b) (6) argument and also claimed that he (b) (6). Specifically, he argued that the (b) (6) and that he was at (b) (6). The BIA dismissed the appeal, agreeing with the IJ that (b) (6) had established neither (b) (6). The BIA did not address (b) (6)'s contention that he would be (b) (6) in Guatemala as a result of his (b) (6).

ANALYSIS

This case turns on whether (b) (6) established a (b) (6). Because the BIA erred in failing to address his claims of (b) (6), we remand for consideration of (b) (6) claim.

[1] (b) (6) tied his claims of (b) (6) to (b) (6). The BIA concurred in the IJ's analysis that (b) (6) failed to establish a (b) (6). The BIA also agreed with the IJ's conclusion that, because (b) (6) and did not (b) (6), there was little likelihood that he would (b) (6). Substantial evidence supports the BIA's conclusions. See (b) (6) (9th Cir.2013) (The BIA's "purely factual determinations" are reviewed only for "substantial evidence.").

[2] However, our analysis does not end there. The crux of this appeal is (b) (6).

(b) (6). Despite the government's argument to the contrary, (b) (6) raised this claim in his brief to the Board. In so doing, he properly exhausted his administrative remedies. See (b) (6) (9th Cir.2004) (explaining that to exhaust (b) (6) claim, an applicant must put the BIA on notice by raising any issues in the notice of appeal or in the briefs).

Before the IJ, (b) (6) claimed that (b) (6) but was (b) (6) the hearing. After (b) (6), even though (b) (6). The IJ made no adverse finding as to (b) (6)'s credibility and expressly acknowledged that (b) (6) were apparently (b) (6). The IJ went on to note that (b) (6) could not establish a claim (b) (6) because he had (b) (6).

*3 The IJ's characterization misapprehended (b) (6)'s complaint—he does not claim to be a (b) (6).

Rather, he asserts that he is a (b) (6). The BIA did not address this (b) (6)—a failure that constitutes error and requires remand. See *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir.2005) (The BIA is "not free to ignore arguments raised by a petitioner."). A short history of the evolving definition of the term "(b) (6)" is useful at this stage of the proceedings, particularly in light of the risk that (b) (6) claim might once again be misconstrued on remand.

"(b) (6)" is an enigmatic and difficult-to-define term. (b) (6) (9th Cir.2009). In the seminal case addressing the phrase, the BIA determined that a (b) (6) must consist of (b) (6) (B.I.A.1985), overruled on other grounds, (b) (6) (B.I.A.1987).

Over time, the flexible nature of (b) (6) created "confusion and a lack of consistency" among the judges tasked with adjudicating

(b) (6) claims. (b) (6) (B.I.A.2014). In 2006, responding to calls from the circuit courts for greater clarity regarding the framework for determining the existence of a (b) (6), the BIA adopted the (b) (6) (B.I.A.2006). (b) (6) focused on whether (b) (6). Id. Thus, for example, the BIA concluded that (b) (6) because “the very nature of the conduct at issue is such that it is generally out of the public view,” such (b) (6) Id. at 960.

Despite the BIA’s elaboration of (b) (6), the illusive nature of the requirement spawned inter-circuit disagreement. (b) (6) (9th Cir.2013) (en banc). In (b) (6), we wrote that (b) (6) required that (b) (6) Id. at 1088–89 (citations omitted). (b) (6) requirement, because (b) (6) is, by definition, (b) (6) and because Salvadoran (b) (6) by enacting protective legislation to safeguard those (b) (6) Id. at 1092 (citation omitted).

*4 A majority of the en banc court elaborated that “in the context of (b) (6) we believe that the perception of (b) (6) may matter the most.” Id. at 1089. As noted in the concurrence, however, “[d]efining (b) (6) better comports with the case law” and “also makes common sense.” Id. at 1094 (McKeown, J., concurring). In the end, our conclusion that the (b) (6)’s perception matters most in determining whether a claim satisfied (b) (6) was unnecessary to our decision.

[3] In the wake of (b) (6), the BIA revisited the framework for assessing claims based on (b) (6) (B.I.A.2014). The new (b) (6) analysis “refers to (b) (6) Id. The BIA further

clarified that recognition of a (b) (6) “is determined by the (b) (6), rather than by the (b) (6).” Id. at 242. This approach contrasts with the en banc majority’s focus on the (b) (6), and comports with the above-referenced concurrence. Under the BIA’s revised rubric, an applicant for (b) (6) on (b) (6) Id. at 237.

[4] Even under this refined framework, (b) (6) remains the (b) (6). See id. at 240, 247 (citing with approval prior decisions finding the (b) (6). In (b) (6), we held “that (b) (6) and thus confer (b) (6) status on (b) (6).” (b) (6) (9th Cir.2005) (en banc), vacated on other grounds, (b) (6) (2006). We also recognized that (b) (6) Id. at 1188. We declined to hold, however, “that a (b) (6) on that (b) (6) Id.

Our sister circuits similarly recognize (b) (6) as a (b) (6). See, e.g., (b) (6) (4th Cir.2011) (“[E]very circuit to have considered the question has held that (b) (6) (b) (6) (6th Cir.2009) (b) (6) [] is widely recognized by the caselaw.”); (b) (6) (1st Cir.1993) (“There can, in fact, be no plainer example of a (b) (6)”). The Fourth Circuit’s decision in (b) (6) is illustrative here. In (b) (6), the petitioner claimed (b) (6) (b) (6). The court pointed out that the BIA had misconstrued (b) (6) Id. Because (b) (6) than

(b) (6),” the BIA’s determination that the petitioner had not shown (b) (6) “was manifestly contrary to law.” *Id.* at 126.

*5 In the face of (b) (6) (b) (6), the BIA erred in not addressing (b) (6) claim.

Accordingly, the petition for review is **DENIED** in part and **GRANTED** in part. The BIA’s decision is

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

1 The BIA affirmed the Immigration Judge’s (“IJ”) determination that (b) (6) claim was (b) (6) because he failed to either (b) (6) pursuant to (b) (6). On appeal to this court, (b) (6) abandoned his claims for (b) (6) by not addressing them with any specificity in his briefs. See *Aguilar-Ramos v. Holder*, 594 F.3d 701, 703 n. 1 (9th Cir.2010) (citing *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir.1996) (“Issues raised in a brief that are not supported by argument are deemed abandoned.”)).

2 (b) (6) was decided one year after the IJ denied (b) (6) ’s application. (b) (6) (9th Cir.2013) (en banc).

VACATED AND REMANDED for further proceedings.

Each party shall bear its own costs on appeal.

All Citations

--- F.3d ----, (b) (6)

(b) (6)
United States Court of Appeals,
Sixth Circuit.

(b) (6), Petitioner,
v.
Loretta E. Lynch, Attorney General, Respondent.

No. (b) (6)

Decided and Filed: May 27, 2016

On Petition for Review of an Order of the Board of
Immigration Appeals. No. (b) (6) —Memphis.

Attorneys and Law Firms

ON BRIEF: Kathryn M. McKinney, UNITED STATE
DEPARTMENT OF JUSTICE, Washington, D.C., for
Respondent. Jian Ping Wang, San Gabriel, California, pro
se.

Before: SUHRHEINRICH, DAUGHTREY, and
ROGERS, Circuit Judges.

OPINION

ROGERS, Circuit Judge.

An applicant for a government benefit such as (b) (6) may understandably pattern the facts of his application on those asserted by other applicants in previously successful applications. The tendency is doubtless stronger when the applicant is from a foreign culture where caution may be the watchword in giving personal information to the government, and especially where the applicant is not really sure what information our government is looking for. Recognizing the strength of such temptation, an immigration judge may reasonably question the truthfulness of (b) (6) applicant whose story of (b) (6) is unbelievably similar to those of previously successful applicants. An immigration judge may properly take such remarkably similar facts as some evidence that an applicant is not telling the truth, at least where the applicant has been given a chance to explain the suspicious similarities. That is what happened in this case. On review of the immigration judge's denial of (b) (6) based in large part on unlikely similarities with

previous applications, the Board of Immigration Appeals properly upheld the denial of the (b) (6) petition in this case.

(b) (6) entered the United States in June 2006 as a nonimmigrant with authorization to remain until September 7, 2006. In November 2006, (b) (6) appeared before an IJ, and after conceding removability, filed an application for (b) (6).

The Department of Homeland Security (DHS) argued among other things that (b) (6) application was strikingly similar to several others. The IJ nonetheless determined that (b) (6)'s testimony was credible, and issued an oral decision granting (b) (6)'s application for (b) (6) based upon (b) (6). The IJ, stating that the similarities might have arisen from the applications' having been prepared by the same person, declined to consider the other applications. On appeal, the BIA reasoned that the IJ's credibility analysis was insufficient and failed to adequately address the DHS's argument regarding the similarities between (b) (6)'s application and the others. According to the BIA, the IJ also failed to adequately address the evidence in the record. The BIA remanded the case to the IJ for fuller consideration of the record and the DHS's argument.

The previous IJ having in the meantime been transferred, a new IJ was assigned the case on remand. The IJ pointed out that (b) (6)'s story contained many implausible elements, such as (b) (6)'s statement that he was placed (b) (6) but still managed to obtain a visa, which requires an interview. The IJ also noted the unlikelihood of (b) (6)'s being able to board a plane and leave China even though he was (b) (6). Most damaging to (b) (6)'s credibility, however, were "two (b) (6) applications from completely unrelated cases that share a striking number of very specific details."

The IJ noted as an initial matter that "all three statements attached to the (b) (6) applications appear to use the same formatting including the same font type, font size, typeface, margins, spacing, headings and so forth." The IJ then turned to the substantive similarities:

[A]ll three narratives are very similar substantively. Two of the three respondents, including Respondent, were (b) (6)

In these stories, (b) (6) and respondents, who eventually felt that (b) (6) was

(b) (6). The (b) (6)
In the third application, the respondent was introduced to (b) (6)
This friend invited the respondent to a (b) (6).

In all three applications, the respondents attended (b) (6). In all three accounts, the respondents were (b) (6). In two of the accounts, (b) (6). In all of the stories, (b) (6). The (b) (6)

(b) (6), all three respondents had very similar experiences. The respondents were all (b) (6).

The respondents answered that (b) (6). The respondents were then (b) (6).

All three (b) (6). The respondents were (b) (6). In all three accounts, the respondents (b) (6).

All of the respondents were (b) (6). All three respondents were (b) (6). The respondents were (b) (6). Due to the urging of friends and family members, the respondents made plans to come to the U.S. After their arrivals, all three were informed (b) (6).

These substantive similarities, according to the IJ, were “not as striking as the frequent occurrence of similar or identical language and phrasing across the applications”:

All three applications have the same introductory

paragraph stating “Because of (b) (6) from China. I hereby apply to the US Government for (b) (6).” The three respondents also state in their applications, “I often (b) (6)

In all three cases, (b) (6) also asked what the respondents’ “reactionary purpose” was. They were (b) (6) as soon as possible (sic).”

Finally, Respondent’s statement says (b) (6) China now.” Another statement is almost identical stating (b) (6) China now.” All three respondents close their statements by saying, “Therefore, I apply to the US government for (b) (6). Please grant me (sic).”

The IJ proceeded to explain why (b) (6)’s explanations of these similarities were inadequate and why these similarities supported the IJ’s finding of (b) (6)’s lack of credibility:

This analysis is by no means an exhaustive enumeration of every similarity found across these three separate and unrelated (b) (6) applications by applicants represented by different attorneys, and allegedly speaking through different translators There are many other similarities among the statements. The potential innocent explanations of these similarities discussed above do not square with the evidence The first two possibilities, that the different applicants inserted truthful information into standardized templates, and the similarities are the result of the same translator using their own rigid style, do not apply here, as all three applications were apparently prepared by different translators. Further, Respondent stated his translator was a friend of his from his Church in Los Angeles. The next possibility, that Respondent’s application is the true account and

the others are plagiarized, is not likely as Respondent stated that he did not tell his story to or share his statement with anyone other than (b) (6) who translated the statement for him. (b) (6) did not translate the other two statements. Finally, the last explanation, that the similarities resulted from faulty translation, is also speculation. ... Moreover, faulty translation could not have resulted in the use of such specific identical wording as “(b) (6)” and “reactionary purpose” as well as entire paragraphs being same. Further, Respondent stated that he alone wrote his statement and that he did not use a snakehead or an attorney in preparing his original statement. Therefore, the Court is left only with what is within the four corners of the record. The Court does not feel the need to reach the full conclusion that Respondent’s entire (b) (6) application is outrightly fraudulent. However, the Court cannot overlook these striking similarities and believes they reflect adversely on Respondent’s credibility.

Based on the inherent implausibility of elements of his story, and the suspicious number of highly specific similarities between his application statement and two others submitted by DHS, the IJ found (b) (6) not credible.

In doing so, the IJ relied upon the fact that (b) (6) had been notified of the similarities and given an opportunity to explain them: DHS made the inter-application-similarity argument at the initial IJ hearing, and the similar applications were in the record and were the primary rationale for the BIA’s remand decision. In addition to these implicit notifications, the IJ, on remand, notified (b) (6) of the similarities and gave him an opportunity to respond to them.

Furthermore, the IJ analyzed letters and (b) (6) that (b) (6) submitted, and the IJ found this evidence to be insufficiently corroborative of (b) (6)’s claim. The IJ accordingly denied (b) (6)’s application for (b) (6). The IJ also determined that (b) (6) failed to meet (b) (6) or (b) (6). The IJ thus denied all of (b) (6)’s requested relief and ordered (b) (6) removed. On appeal, the BIA upheld the IJ’s ruling. The BIA, in its order, in essence agreed with the IJ’s findings. Regarding the credibility determination, the BIA affirmed the IJ’s order based on the IJ’s stated reasons. The BIA also repeated the IJ’s findings on (b) (6)’s evidence and agreed with those findings.

(b) (6) petitions this court for review and contends that the previous, unrelated applications “should have no bearing on this case.” (b) (6) argues that the similarities could have resulted from their being prepared by the same office and

from the fact that thousands of Chinese (b) (6). However, the agency may consider for credibility purposes the close similarity of the asserted facts in unrelated (b) (6) cases, as long as the agency meets the procedural requirements that the BIA has recognized. That is the case here.

The reasoning and holding of the Second Circuit in (b) (6) (2d Cir. 2007), and the framework subsequently laid out in *Matter of R-K-K-*, 26 I. & N. Dec. 658 (BIA 2015), are persuasive in reaching this conclusion. In (b) (6) (b) (6) submitted an affidavit that included twenty-three discrete instances of language, grammar, and order that were “strikingly similar” to an unrelated applicant’s affidavits. 489 F.3d at 519–20, 522–23. In that case, the IJ notified the applicant of the similarities, expressed concerns to the applicant about the similarities, afforded the applicant opportunities to comment on these similarities, and allowed the applicant to offer evidence explaining the similarities. *Id.* at 525. The Second Circuit concluded that “[o]nce it became evident that (b) (6) would not seek to take advantage of these numerous opportunities to explain, it became reasonable for [the] IJ ... to draw the inference that the remarkable inter-proceeding similarities were evidence that (b) (6)’s asylum application was false.” *Id.* The BIA, in *Matter of R-K-K-*, organized (b) (6)’s reasoning into a three-step framework:

First, the [IJ] should give the applicant meaningful notice of the similarities that are considered to be significant. Second, the [IJ] should give the applicant a reasonable opportunity to explain the similarities. Finally, the [IJ] should consider the totality of the circumstances in making a credibility determination. Each of these steps must be done on the record in a manner that will allow the [BIA] and any reviewing court to ensure that the procedures have been followed.

26 I. & N. Dec. at 661.

The First Circuit’s decision in (b) (6) (1st Cir. 2011), supports this reasoning. In (b) (6), an individual from the Ivory Coast sought (b) (6). *Id.* at 2. Dehonzai’s (b) (6) application, however, replicated the application of his purported cousin. *Id.* at 4. In its review of the BIA’s decision, the First Circuit stated that “[a] reasonable factfinder could find that (b) (6)’s description of (b) (6) in the same words as [his cousin] was not creditworthy,” and that (b) (6) was notified of and afforded opportunities to explain the similarities “on two different occasions.” *Id.* at 8. The First Circuit upheld the BIA’s finding that (b) (6)

failed to adequately explain the similarities on those occasions. *Id.*

(b) (6) was afforded sufficient procedural safeguards throughout the proceedings in the immigration courts, which squares this case with (b) (6). DHS made the inter-application-similarities argument at the initial hearing and throughout the process of appealing the IJ's initial ruling to the BIA. Furthermore, the similarities provided the predominant basis for the BIA's reversal of the IJ's initial ruling. On remand, the IJ notified (b) (6) of the similarities and gave him an opportunity to explain them, but he did not. (b) (6) cannot claim that his failure to explain the similarities resulted from a lack of notice or from a lack of other procedural safeguards.

(b) (6), on appeal, attempts to explain the similarities, but these explanations are without merit. Although (b) (6) argues that the applications were prepared by the same office, the various (b) (6) application statements were all translated by different individuals. (b) (6) also argues that thousands of (b) (6), so it stands to reason that their (b) (6) applications would be very similar. There is an important distinction, however, between applications that are very similar and applications that are identical in many respects. Although it is true that applicants' narratives might overlap without being met with suspicion, if—as is the case here—the applicants have identical narratives, the IJ may require the applicant to explain the similarities. In response to such a request from the IJ in this case, (b) (6) failed to provide an adequate explanation.¹

(b) (6) also failed to adequately corroborate (b) (6) claims. Although (b) (6) did provide a letter from his wife, the letter was extremely vague and provided no details about his (b) (6) or any information regarding (b) (6). (b) (6) did not offer letters of corroboration from the (b) (6) China or

any corroboration of (b) (6) in the United States. “[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided.” *Lin v. Holder*, 565 F.3d 971, 977 (6th Cir. 2009) (quoting *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004)). The failure to produce reasonably available corroborative evidence supports a finding that the applicant has failed to meet his burden of proof. *Abdurakhmanov v. Holder*, 735 F.3d 341, 347 (6th Cir. 2012). Accordingly, the failure to produce reasonably available corroborative evidence supports the BIA’s determination that (b) (6) failed to show his eligibility for (b) (6).

The IJ’s and BIA’s denials of his application were accordingly supported by substantial evidence and must be upheld. Under the substantial evidence standard, we must uphold factual determinations unless any reasonable adjudicator would be compelled to conclude to the contrary. 8 U.S.C. § 1254(b)(2)(B); *Yu v. Ashcroft*, 364 F.3d 700, 702 (6th Cir. 2004).

Because (b) (6) has failed to demonstrate eligibility for (b) (6), he cannot meet the standard for (b) (6). See (b) (6) (6th Cir. 2008). Moreover, where an applicant has “failed to satisfy the threshold showing of credibility to warrant (b) (6) under the Act, it logically follows that he cannot demonstrate that he is entitled to relief under (b) (6).” (b) (6) (6th Cir. 2009).

The petition for review is accordingly denied.

All Citations

--- F.3d ----, (b) (6)

Footnotes

¹ (b) (6) also argues on appeal that the IJ’s adverse credibility finding did not (b) (6)’s claim. However, this is a REAL ID Act case, and the IJ could base her adverse credibility determination on a variety of considerations without regard to whether those considerations (b) (6)’s claim. See (b) (6).

